TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1928

No. [redacted] 32

SECURITY MORTGAGE COMPANY, PETITIONER,

vs.

CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY FOR FLORIDA FURNITURE CORPORATION, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 10, 1927

CERTIORARI GRANTED JANUARY 23, 1928

(33,114)

1. The liability for attorneys has not accrued - the debt has not been collected by suit through the attorney: The terms of the note have not been complied or been on the maturity of the [illegible] of the mortgaged property: the obligation of the mortgage as pleaded against [illegible] does not affect the title. Neither the note nor the mortgage was sued on in State Court. The [illegible] was a bankrupt at the time proceedings before he was sued in State Court. The collection of the debt is made in the Bankruptcy Court. The suit in the State Court was not necessary [illegible]

John E Benton
Atty Gen in note. Ga Indiv

Trustee as used under
Bkcy Act 5—Wh E
Bkcy not a person liability at
time of bkcy — affirmed
Demurrer ground ga not Claim
Ca - Not found liability at
time of Bkcy.
Benton says claim Misconcepti
— not Ca as stated. — Claim was
Mtge Ca - secured - Atty fees -
Hallis S Dillon

Problem is distribution
Bk't est. atty fees not
due when Trustee went
to sell - If owed Bk would
have gotten the debt in
cash - But, if he was
maker, then he could
add 10% to his claim.

See over p. 9

Exception by Maker

(33,114)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 662

SECURITY MORTGAGE COMPANY, PETITIONER,

vs.

CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY FOR FLORIDA FURNITURE CORPORATION, BANKRUPT

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Proceedings in the United States circuit court of appeals, 5th circuit	a	1
Caption	1	
Record from the district court of the United States, northern district of Georgia	1	1
Petition for creditors for appointment of receiver	1	1
Exhibit A—Petition in voluntary bankruptcy and order of adjudication in United States district court for southern district of Florida	4	3
Order appointing receiver	7	5
Order of United States district court for southern district of Florida postponing sale of property and order of reference thereon	8	6
Petition of trustee in bankruptcy to sell certain property and order of reference thereon	10	17

Judd & Detweiler (Inc.), Printers, Washington, D. C., February 20, 1928

	Original	Print
Order of referee authorizing sale of certain property	17	12
Orders adjourning hearing on motion of creditors, etc.	18	13
Petition of trustee to provide manner and time of sale of realty and order thereon	19	14
Report of trustee on sale of real estate	21	15
Petition of Security Mortgage Co. for confirmation of sale	23	16
Order of referee confirming sale of real estate	28	20
Petition of Security Mortgage Co. relative to liens and order of referee thereon	30	22
Exhibits A and B—Promissory notes, Hansen Motor Co. to Security Mortgage Co., February 24, 1925	35	25
Objections of trustee to allowance of claim of Security Mortgage Co.	37	27
Exhibit A—Resolution	45	31
Petition of trustee for review of order of referee	44	32
Certificate of referee on petition for review	46	34
Decree	50	38
Stipulation as to correctness of facts set out in certificate of referee	51	38
Petition for appeal and order allowing same	52	39
Assignments of error	53	40
Bond on appeal (omitted in printing)	55	
Praecipe for transcript	56	41
Clerk's certificate (omitted in printing)	58	
Citation, Note re	59	42
Argument and submission (omitted in printing)	60	
Opinion, Foster, J.	61	43
Judgment	64	44
Petition for stay of mandate	65	45
Order staying mandate	67	46
Bond (omitted in printing)	68	
Clerk's certificate (omitted in printing)	71	
Order allowing certiorari	72	47

[fols. a & b-d] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 11686. In Bankruptcy

In the Matter of Florida Furniture Company, Bankrupt

Petition for Receiver

To the Honorable Samuel H. Sibley, United States Judge:

The petition of C. F. Baum Company, Chicago, Ill., Fulton Supply Company, Atlanta, Ga., Atlanta Linen Supply Company, Atlanta, Ga. and Freitag Advertising Agency, Atlanta, Ga., respectfully shows:

1

Petitioners show that the above named Florida Furniture Company is a corporation of the State of Florida having an office and place of doing business in Jacksonville, Fla.; that its president, George W. Hanson, resides in Atlanta, Ga., and it has a factory for the manufacture of furniture in the plant of the Hanson Motor Company on the Central of Georgia Railroad Company, just off Lee Street on the road to East Point, just outside the City of Atlanta; that it has assets consisting of raw material and manufactured products as well as goods partially finished of the value of about $50,000.00.

[fol. 2] 2

That the said Florida Furniture Company was at Jacksonville in the Southern District of Florida on the 7th day of January, 1926, adjudicated a bankrupt upon a voluntary petition of the said corporation, a certified copy of the petition and of the order adjudicating said corporation a bankrupt being hereto attached marked Exhibit "A" and made a part of this petition.

3

Your petitioners are unsecured creditors of the above named Florida corporation having provable claims as follows:

C. F. Baum Company, Chicago, Ill.	$185.00
Fulton Supply Company, Atlanta, Ga.	538.99
Atlanta Linen Supply Company, Atlanta, Ga.	5.50
Freitag Advertising Agency, Atlanta, Ga.	430.00

4

Petitioners show that it is absolutely necessary that a receiver be appointed in this jurisdiction to take charge of the assets located in this county, for the purpose of preserving and protecting the same for the benefit of creditors, pending the issue of the bankruptcy proceedings; that said property is without fire insurance and without protection and the same is liable to be moved away or concealed and that it would be for the best interest of all parties con- [fol. 3] cerned that a receiver be appointed by this Honorable Court to take charge of all the assets of the said bankrupt and preserve and protect the same by way of insurance and otherwise for the benefit of creditors.

Wherefore, your petitioners pray that a receiver be appointed to take charge of all the assets and property of every kind of the said alleged bankrupt, and that the receiver be authorized to take such steps as may be necessary to properly protect and preserve same pending the election of a trustee.

C. F. Baum Company, Fulton Supply Company, Atlanta Linen Supply Company, Freitag Advertising Agency, by Clarence H. Calhoun, Their Attorney.

Duly sworn to by Clarence H. Calhoun. Jurat omitted in printing.

[fol. 4] EXHIBIT "A" TO PETITION

Debtor's Petition

Certified Copy Voluntary Petition in Bankruptcy from Southern District of Florida

To the Honorable the Judges of the District Court of the United States for the Southern District of Florida.

The petition of: Florida Furniture Corporation, a corporation under the laws of the state of Florida and having its principal place of business within the Southern District of Florida, to-wit: In Duval County, Florida, and District of the State of Florida, Manufacturer.

Respectfully represents: That it has had its principal place of business at Jacksonville, Duval County, Florida, for the greater portion of six months next immediately preceding the filing of this petition at Jacksonville, Florida, within said Judicial District; that it owes debts which it is unable to pay in full; that it is willing to surrender all its property for the benefit of its creditors except such as is exempt by law, and desires to obtain the benefit of the Acts of Congress relating to Bankruptcy.

That the schedule hereto, annexed, marked A (1, 2, 3, 4, 5) and verified by your petitioner's oath, contains a full and true statement of all its debts, and (so far as it is possible to ascertain) the names and places of residence of its creditors and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B (1, 2, 3, 4, 5, 6) and verified by your petitioner's oath contains an ac- [fol. 5] curate inventory of all its property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioner prays, that it may be adjudged by the Court to be a bankrupt within the purview of said acts.

Florida Furniture Corporation, by G. W. Hanson, its President, Petitioner. Damon G. Yerkes, Attorney for Petitioner.

United States of America,
Southern District of Florida,
County of Duval, ss:

I, George W. Hanson, president of Florida Furniture Corporation, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.
(Signed) G. W. Hanson, Petitioner.

Subscribed and sworn to before me, this 7th day of January, A. D. 1926. Cecile V. Wysong, Notary Public, State of Florida at Large. My com. expires Aug. 9, 1926. (Seal.)

[fol. 6] United States District Court, Southern District of Florida

In Bankruptcy. Case No. 2953

In the Matter of Florida Furniture Corporation a Corporation

Adjudication

At Jacksonville, in said District, on the 7th day of January, A. D. 1926, before the Honorable Rhydon M. Call, the Judge of said Court in Bankruptcy, the petition of Florida Furniture Corporation, a corporation that Florida Furniture Corporation, a corporation, be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to Bankruptcy, having been heard and duly considered, the said Florida Furniture Corporation, a corporation is hereby declared and adjudged bankrupt accordingly.

Done and ordered at Jacksonville, in said District, this 8th day of January, A. D. 1926.

Rhydon M. Call, U. S. District Judge.
Attest: A true copy. Edwin R. Williams, Clerk, by
Geo. T. Kilner, Chief Deputy. (Seal.)

[fol. 7] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

I, Edwin R. Williams, Clerk of the United States District Court, in and for the Southern District of Florida, and as such the legal custodian of the files and records of said Court, do hereby certify, that the foregoing two pages of typewritten matter constitute true copies of the Voluntary Petition in Bankruptcy, and Adjudication, omitting schedules and resolution of the board of directors, directing the President to file said petition, of the Florida Furniture Corporation, a corporation, as the same appears among the files and records of this Court.

Witness: my hand and the official seal of said Court, this the 9th day of January A. D. 1926.

Edwin R. Williams, Clerk, United States District Court for the Southern District of Florida, by Geo. T. Kilners, Chief Deputy Clerk. (Seal.)

IN UNITED STATES DISTRICT COURT

ORDER APPOINTING RECEIVER—Filed January 11, 1926

Read and considered. It is ordered that R. A. Burnett be and he is hereby appointed receiver, and is directed to take charge of the assets of the said Florida Furniture Company, bankrupt, protect the same by insurance and otherwise, take an inventory, collect in the outstanding ac-[fol. 8] counts, and hold said assets subject to the further order of the Court. Let him file with the Clerk of this Court, as provided by statute, bond in the sum of $5,000.00.

Dated this 11 day of January, 1926.

Sam'l H. Sibley, United States Judge.

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

In the Matter of FLORIDA FURNITURE CORPORATION, Bankrupt

ORDER POSTPONING SALE OF PROPERTY AND ORDER OF REFEREE THEREON—Filed June 29, 1926

It having been made to appear to the Court that an application has been made by Charles A. Powers, Trustee in bankruptcy in this matter, to the United States District Court in and for the Northern District of the State of Georgia, for a sale of certain assets of the Florida Furniture Corporation, bankrupt, and that this application has been made to the said Court in the Northern District of Georgia since the filing of a petition by Hanson Motor Company to vacate the adjudication in this cause.

It is thereupon ordered and decreed that the Trustee in bankruptcy in this matter make no application to the Court in the Northern District of the State of Georgia, or elsewhere, for the sale of any of the assets of Florida Furniture Corporation, nor to proceed further under any application that may have been made or any order obtained thereunder, until the further order of this Court.

[fol. 9] Done and ordered at Jacksonville, Florida, this 6th day of April, A. D. 1926.

Rhydon M. Call, Judge.

UNITED STATES OF AMERICA,
Southern District of Florida:

I, Edwin R. Williams, Clerk of the United States District Court, in and for the Southern District of Florida, do hereby certify the foregoing to be a true and correct copy of an order made and entered in said Court on the 6th day of April, 1926, as the same appears of record and file in said Court.

Witness my hand and the official seal of said Court this the 6th day of April, 1926.

Edwin R. Williams, Clerk U. S. District Court, Southern District of Florida. (Seal.)

The foregoing certified copy of the order of the District Court of the U. S. for the Southern District of Florida having been filed in this case it is ordered that the trustee's petition to sell be postponed until the further order of this Court.

April 7th, 1926.

Harry Dodd, Referee.

[fol. 10] IN UNITED STATES DISTRICT COURT

PETITION TO SELL REAL ESTATE AND ORDER OF REFEREE THEREON

To the Honorable Harry Dodd, Referee in said case:

Now comes Charles A. Powers, trustee in bankruptcy of the above named bankrupt, and respectfully shows:

1

That petitioner is the duly elected trustee, qualified and acting as such in the United States District Court, for the Southern District of Florida, the Court of original jurisdiction in said case, and that R. A. Burnett, of Atlanta, Georgia, is assistant and associate trustee in said case, made so on the application of your petitioner and by an order of Honorable Samuel H. Sibley, judge of the United States District Court, for the Northern District of Georgia, at Atlanta, Georgia.

2

That petitioner, as trustee, is in possession of and has the custody and control of and title to the following real estate consisting of improved property known as the plant, building, office, and vacant real property of the Florida Furniture Corporation formerly known as the property of Hanson Motor Company, at Atlanta, Georgia, and more particularly described as follows:

All that tract or body of land lying and being in Land Lot No. 119, of the 14th District of Fulton County, Georgia, being improved property and having thereon improvements

and beginning at the intersection of the West side of Sylvan [fol. 11] Road formerly Ashby Street, and the Southeast side of Murphy Avenue, said Southeast side being ninety-four (94) feet from and parallel to the center line of the Atlanta & West Point Railroad track; thence Southwesterly along the Southeast side of Murphy Avenue, four hundred, thirty-three and three-tenths (433.3) feet; thence Southeasterly at right angles to Murphy Avenue two hundred thirty-four (234) feet; thence Southwesterly nineteen (19) feet more or less to a point eight (8) feet Northeasterly from the center line of a spur track serving the warehouse of A. P. Morgan Grain Company on the Northeast side of thereof; thence Southeasterly parallel with said center line twelve (12) feet; thence Southwesterly along a line which is parallel to and forty (40) feet from the Southeast building line of said warehouse one hundred twenty-six (126) feet, more or less, to a point which is eight (8) feet from measured Northeasterly at right angles to the center line of a spur track serving said warehouse on the Southerly at right angles to the center line of a spur track serving the warehouse on the Southwest side thereof; thence Southeasterly parallel with said center line and eight (8) feet therefrom, sixty-five (65) feet, more or less, to a point which is twenty-five (25) feet from measured Northerly at right angles to the center line of the Atlanta & West Point Belt line main track; thence Southeasterly parallel with the center line of said main track, one hundred seventy (170) feet, more or less, to Sylvan Road thence seven hundred four tenths (704.4) feet, more or less, to the point of beginning, with the free use, right and liberty of a thirty (30) foot road known as Murphy Avenue paralleling the Central of Georgia Railway right of way and lying between it and the property above described. Also, a private road twenty (20) feet wide lying between the property above described and the property of A. P. Morgan Grain Company ware- [fol. 12] house, but reserving from above land the use of the Atlanta & West Point Railroad of a right of way sixteen (16) feet in width lying eight (8) feet on each side and parallel with and adjacent to the center line of a spur track serving the above mentioned warehouse on the Northeast side thereof.

3

The above is the property conveyed to the bankrupt corporation by Hanson Motor Company by a deed.

4

Petitioner shows that the same is the property conveyed by the bankrupt to Security Mortgage Company of Atlanta, Georgia, February 24th, 1925, to secure a loan by the said Security Mortgage Company to the Hanson Motor Company of said deed and in the sum of $90,000.00 principal, besides ten (10) interest notes of $3,150.00 each principal, and due February 24th and August 24th, each year from February 24th, 1925, and bearing interest from maturity at 8%. The property above described and conveyed to secure said loan of $90,000.00 besides interest as set out, to Security Mortgage Company, has by them under date of February 25th, 1925, been sold and transferred to Citizens & Southern Bank as trustee, which said Citizens & Southern Bank, as trustee, holds the record title to all the property described to secure payment of the loan of $90,000.00 and the interest as set out.

5

Your petitioner shows that R. O. Campbell Coal Company of Atlanta, Georgia, on January 23rd, 1926, filed its [fol. 13] notice of a lien for material furnished for the improvement of said property but fails to set out the amount of said lien, said lien being recorded in Book 622, Page 249, Fulton County records.

6

Petitioner shows to the Court that taxes due the State and County for the year of 1925 are due and unpaid and is a lien on the property in the sum of $1,282.50.

7

Your petitioner shows that said property is expensive to retain, it being necessary to employ night and day watch-

men, two (2) in number, at an expense of $36.00 per week, besides furnishing light and fuel as well as a large water supply for sprinkler system and to pay approximately $40.00 per month fire insurance premium as well as $24.50 watchmen fire alarm service or an aggregate of more than $200.00 per month actual preservation costs.

8

That interest on the loan for which the property is pledged as security is $6,250.00 per year, being more than $500.00 per month and your petitioner represents that the probable actual cost of keeping the said property is $750.00 per month, making the same exceedingly expensive to the bankrupt estate.

9

Your petitioner shows that the corporation was adjudicated a bankrupt on its own petition asking adjudication [fol. 14] and that thereafter some of the stockholders of said company filed a motion at Jacksonville, Florida, through Underwood, Pomeroy and Haas, Attorneys, Atlanta, Georgia, seeking to set aside the adjudication but that said motion was set down at a date far distant from the date of filing, namely, February 22nd, 1926, and that the same has been continued to an indefinite date and no immediate hearing on said motion is anticipated or is possible, and that the estate in the meantime is being held intact at a great loss to the unsecured creditors of said estate.

10

Petitioner represents that it is necessary and extremely beneficial to the estate that immediate steps to sell the property, realty, of the corporation, be taken and petitioner brings this application for leave to sell as early as possible.

Wherefore, petitioner prays that the Court pass a proper order, looking to the immediate sale of said property either free from liens or subject to the lien of Security Mortgage Company which has been transferred to the Citizens & Southern Bank of Atlanta, Georgia, as trustee.

Clarence H. Calhoun, D. J. Lewis, Attorneys for Trustee.

Duly sworn to by Charles A. Powers. Jurat omitted in printing.

[fol. 15] Sworn and subscribed to before me, this 11th day of March, 1926. R. H. Crawford, Notary Public, State at Large, Fla. Com. Ex. May 14, 1926. (Notarial Seal.)

Order

The foregoing application of the trustee in bankruptcy of the above named estate to sell real property of the bankrupt corporation, presented, read and considered. It is ordered, that a copy of said application and this order be served on the applicants for an order setting aside the adjudication by serving the attorneys of record for said applicants, also, that a copy of this application and order of the trustee be served on Citizens & Southern Bank, as trustee, Atlanta, Georgia, and Security Mortgage Company, Atlanta, Georgia, by serving a proper officer of each of said corporations, as well as a copy of said petition to be served on R. O. Campbell Coal Company, Atlanta, Georgia, and let them show cause before this Court on the 17 day of March, 1926, at 10 o'clock A. M., why the application to sell the real property as described should not be granted.

Dated this 12 day of March, 1926.

Harry Dodd, Referee in Bankruptcy. (Seal.)

State of Georgia,
County of Fulton:

Personally appeared before me, W. T. McKnight, who being duly sworn deposes and says that he served the within petition on parties thereto by serving Underwood, Pomeroy & Haas by handing a copy of the same to Mr. [fol. 16] Marvin Underwood, of said firm; by handing a copy of the same to W. D. Thompson, attorney for Security Mortgage Company; by handing a copy of same to Geo. T. David, assistant cashier Citizens & Southern Bank, Atlanta, Georgia. That all of said services were in person and to the parties named.

W. T. McKnight.

Sworn and subscribed to before me, this 13th day of March, 1926. H. W. Finch, Notary Public, State at Large, Ga.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before me John McElroy, who on oath says that he served R. O. Campbell Coal Company with the within petition and order by handing a copy of the same to James L. Gerideau, secretary-treasurer of R. O. Campbell Coal Company.

Dated this 13th day of March, 1926.

John McElroy.

Sworn and subscribed to before me, this 13 day of March, 1926. H W. Finch, Notary Public, State at Large, Ga.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFEREE AUTHORIZING SALE OF CERTAIN PROPERTY

The trustee having renewed his petition for leave to sell the real estate in the above stated casa, and having represented that the order of the District Judge for the Southern District of Florida, heretofore granted restraining the trustee from proceeding, has been dissolved and an order passed by said Court directing the trustee to proceed with the disposition of the assets of the bankrupt corporation as he may be authorized and directed by orders of the Court:

Now, therefore, it is ordered that the trustee be and he is hereby authorized and directed to advertise all of the real estate and improvements thereon for sale to be had on the 28th day of May, 1926, at 10:00 o'clock a. m., in the office of the undersigned referee.

The trustee is authorized at said time and place to offer said property; first, free from all liens, especially free from

the lien claimed by the Security Mortgage Co. preserving the rights of the Security Mortgage Co. to claim the proceeds of said sale in the hands of the trustee; and second, if no satisfactory offer is received therefore, then the trustee may offer said property for sale subject to all liens including the lien held by the Security Mortgage Co., and report to this Court for confirmation the highest and best and most acceptable bid obtained for said property.

[fol. 18] Let said property be duly appraised as required by law and notice to creditors be given.

This the 14th day of May, 1926.

Harry Dodd, Referee.

In United States District Court

Orders Adjourning Hearing

On motion of counsel for creditors seeking to set aside the adjudication of bankruptcy in the Court of original jurisdiction the hearing on the foregoing rule is adjourned to March 19th, 1926, at 10 A. M.

This March 17, 1926.

Harry Dodd, Referee.

On motion of counsel for creditors seeking to vacate the adjudication in the Court of original jurisdiction the hearing on this rule is adjourned to March 30th, 1926, at 10 A. M.

March 19th, 1926.

Harry Dodd, Referee.

Hearing on petition again adjourned to April 7th, 1926, at 12 M.

March 30/26.

Harry Dodd, Referee.

Filed in Clerk's office, 1:30 P. M., June 29, 1926.

[fol. 19] IN UNITED STATES DISTRICT COURT

PETITION AND ORDER PROVIDING MANNER AND TIME OF SALES OF REALTY—Filed June 29, 1926

To the Honorable Harry Dodd, Referee:

Now comes Chas. A. Powers, trustee, through his attorney of record, and shows:

1

That on May 28th, the date set for a sale of the assets of the above corporation, that your petitioner did not at that time receive satisfactory bids for the real estate and buildings of the bankrupt corporation but that subsequently more than one offer has been proposed as a sale price for the property and that the property should be sold as early as possible.

2

That reasons for such sale have heretofore been advanced to the Court in your petitioner's original application for an order of sale all of which are confirmed herein.

Wherefore, petitioner brings this application into Court to provide manner and time of sale of the realty.

Dillon, Calhoun & Dillon, Attorney for Trustee.

[fol. 20] *Duly sworn to by Clarence H. Calhoun. Jurat omitted in printing.*

It is ordered that the trustee sell the real estate in question particularly described by metes and bounds in the former petition for leave to sell of file herein, free from all liens, in the office of the undersigned Referee, 325 Grant Bldg., Atlanta, Ga., on June 12th, 1926, at 11 A. M. at auction to the highest bidder and best bidder subject to confirmation. The rights of all lien creditors preserved in the proceeds. Let notice be given creditors as required by law.

This June 2nd, 1926.

Harry Dodd, Referee.

[fol. 21] IN UNITED STATES DISTRICT COURT

REPORT OF TRUSTEE ON SALE OF REAL ESTATE

To the Honorable Harry Dodd, Referee:

Now comes Charles A. Powers, trustee by and through his attorney, and shows:

1

That pursuant to an order of sale heretofore made in this case, the real property of the bankrupt, consisting of plant and equipment attached thereto and known as the Hanson Motor Company plant, was offered for sale before this Court on the 12th day of June, 1926, and adjourned to the 14th day of June, 1926, at 11 o'clock A. M. That said property was offered for sale free of any liens, including the lien of taxes.

2

Your petitioner shows that Security Mortgage Company, of Atlanta, claims a lien under a mortgage deed between itself and Hanson Motor Company, predecessors of Florida Furniture Corporation, for approximately $104,700.00, and that there are State and County taxes due on said property for the years of 1925 and 1926 in a sum approximately $5,800.00, making a total of liens claimed against the property of $110,500.00.

3

Your petitioner shows that two bidders were present, making two bids each, the highest of which was that of Security Mortgage Company in the sum of $112,500.00 which bid was for the entire property, free of all liens.

[fol. 22]

4

Your petitioner shows that said property has been in his hands, care and maintenance for more than five months but for the greater part of this time, to-wit, up to and including May 12th, 1926, the property was withheld from sale by order of Court on application of Hanson Motor Company, and that on May 12th, 1926, your petitioner was

directed, by the Court, to proceed with a sale and that promptly the property was advertised for sale and diligent effort has been made to find a proper customer but that this property is large and expensive and in the time allotted to petitioner, he has been unable to procure a satisfactory offer for the property.

5

Your petitioner shows that the bid of $112,500.00 made by Security Mortgage Company, while the best offer at this time, is not an adequate price for said property and does not represent 75 per cent of the appraised value of said property, neither is it sufficient to pay the expenses necessary to preserve and protect the property, prepare and provide for a sale of the same, including costs of administration, and at the same time pay the alleged amount of liens claimed.

6

Your petitioner shows that the Security Mortgage Company was, by an order of this Court, served with a copy of the petition and order of sale selling said property free of liens and by order of Court has been made a party to this order of sale, that said Security Mortgage Company has not presented its claim or lien for adjudication on this Court.

[fol. 23] Wherefore, petitioner prays leave to file this report of proceedings had in the matter of a sale of the property set out herein for such action as the Court may deem proper.

Clarence H. Calhoun, Attorney for Charles A. Powers, Trustee.

In United States District Court

Petition of Security Mortgage Company for Confirmation of Sale

To the Honorable Harry Dodd, Referee in Bankruptcy:

The petition of Security Mortgage Company respectfully shows:

1

That on the 14th day of May, 1926, an order was passed by this Court, directing the Trustee to advertise all of the real estate and improvements thereon of the above named bankrupt for sale to be had on the 28th day of May, 1926, at ten o'clock A. M., in the office of the Referee.

2

That pursuant to said order, said real estate was offered for sale in the office of the Referee on the 28th day of May, the Trustee being present thereat. Your petitioner bid the amount of a debt due it by the Hanson Motor Company which has been assumed by the bankrupt as a part of the consideration of the purchase of said real estate. No other bids having been made the Referee adjourned said sale until June 12th at eleven o'clock, at which time no further bids having been received, the Trustee was so notified and the sale again was postponed until eleven o'clock June 14th, [fol. 24] at which time the real estate scheduled in said cause was put up and, after several bids were made by several parties, same was knocked down to petitioner at and for the sum of $112,500.00, the same being the highest and best bid made at said sale.

3

That the land and improvements referred to herein is that tract of land situated in Fulton County, Georgia, at the southwest corner of Sylvan Road and Murphy Avenue, fronting four hundred thirty-three and three-tenths (433.3) feet on Murphy Avenue and fronting seven hundred and four-tenths (700.4) feet, more or less, on Sylvan Road, being improved property and having thereon buildings used by the Hanson Motor Company in the manufacture of automobiles and later by the Florida Furniture Company in the manufacture of furniture. For a more particular description see loan deed executed by the Hanson Motor Company to petitioner, under date of February 24th, 1925, recorded on the 25th day of February, 1925, in Book 907, Page 65, of the records of the Clerk of the Superior Court of Fulton County, Georgia.

4

Your petitioner shows that it verily believes that a larger sum than is above stated cannot be obtained as the sale was largely attended and fairly conducted and that petitioner's debt bears interest at the rate of 7% per annum and is rapidly increasing and if said sale is not confirmed to it, interest charges and expenses attendant upon keeping said property insured and preserved for a longer time would be considerable and having been offered for sale three times and unlikely to produce better results, your petitioner verily believes that the sale should be confirmed.

[fol. 25] 5

Petitioner further shows that the Trustee having diligently attempted to sell said property and having so far failed to obtain a better or higher bid than that of petitioner and that petitioner's debt being a priority over and above that of other creditors, the sale as had on the 14th day of June should be confirmed or the Trustee should be directed to relinquish any claim of the bankrupt in said land, the bankrupt having failed to carry out the conditions of the deed under which it holds and under which the Trustee is now in possession, said deed having been executed and delivered subject to all the terms and conditions of the loan deed of the Hanson Motor Company to your petitioner described above.

6

Petitioner shows that the amount of the debt owing under and by virtue of the terms of said loan deed is as follows: a verdict and a judgment based thereon rendered on the 4th day of May, 1926, and recorded in General Execution Docket 42, Page 126, in the records of the Clerk of the Superior Court of Fulton County, Georgia, said judgment having been declared by the City Court of Atlanta to be a special lien upon the land hereinabove referred to. Said judgment amounts to principal $93,150.00, interest to date of judgment, May 4th, 1926, $1,274.00 and interest thereon from date of judgment at the rate of 8% per annum to date of payment, attorney's fees $9,442.00, costs of Court $15.85.

In addition thereto, your petitioner is the holder of a certain tax fi. fa. issued by the State of Georgia and County of Fulton for State and County taxes for the year, 1925, against the Hanson Motor Company, which is a lien on the land above described amounting, on the date of the [fol. 26] transfer by the Tax Collector, to $1,284.30, as of the 5th day of April, 1926, besides interest on said sum at the rate of 7% per annum from said date. Said tax fi. fa. having been entered on General Execution Docket No. 42, Page 84, in the office of the Clerk of the Superior Court of Fulton County, Georgia. It is also the holder of a certain tax fi. fa. issued by the City of Atlanta for city taxes for the year, 1925, against the Hanson Motor Company, which is a lien on the land above described amounting, on the date of the transfer by the Tax Collector, to $1759.50, as of the 5th day of April, 1926, besides interest on said sum at the rate of 7% per annum from said date. Said tax fi. fa. having been entered on General Execution Docket No. 42, Page 84, in the office of the Clerk of the Superior Court of Fulton County, Georgia.

7

Petitioner further shows that under and by virtue of the laws of the State of Georgia and ordinances of the City of Atlanta a lien for taxes for the year, 1926, is in existence and has existed against said land since the first and thirty-first days of January, respectively.

8

That said land was offered for sale pursuant to said order free and clear of all liens.

Wherefore, petitioner prays that an order be passed confirming said sale and authorizing and directing the Trustee to deliver good and sufficient deed and possession of said real estate and improvements thereon to your petitioner upon payment of the amount bid by it at said sale, it being the highest and best bidder thereat, and that your peti- [fol. 27] tioner be allowed a reasonable time, not less than ten days, for the purpose of examining the titles to said land in order to ascertain the existence of any other liens

or defects in said title in order that the Trustee might have a reasonable time within which to cure said defects, if possible, and should said examination of title disclose any defect that would prevent the Trustee from delivering to petitioner a good and marketable title, petitioner be released from any obligation incurred by reason of having made said bid.

Security Mortgage Co., by Asa W. Candler, Secy.

Duly sworn to by Asa W. Candler. Jurat omitted in printing.

[fol. 28] In United States District Court

Order of Referee Confirming Sale of Real Estate—Filed June 29, 1926

The Trustee in the above stated case having made a report of the sale of the real estate belonging to the estate of said bankrupt, and the successful bidder, the Security Mortgage Co., having likewise filed a report of said sale, and the Trustee having made his report praying for such action as the Court may deem proper, and the Security Mortgage Co., praying for a confirmation of said sale,

Now at the time and place fixed for hearing the application for confirmation, it is ordered as follows:

It appearing that the Security Mortgage Co., was the highest and best bidder at the sale of the real estate scheduled in the petition of the above named bankrupt and located in Atlanta, Fulton County, Georgia, being a certain tract of land in Land Lot No. 119 of the 14th District of said County, at the Southwest corner of Sylvan Road and Murphy Avenue, fronting four hundred thirty-three and three-tenths (433.3) feet on Murphy Avenue and fronting seven hundred and four-tenths (700.4) feet, more or less, on Sylvan Road, as more fully described in a loan deed from Hanson Motor Company to Security Mortgage Company, dated February 24, 1925, recorded on the — day of February, 1925, in Book 907, page 65, of the records of the Clerk of the Superior Court of Fulton County, Georgia, and notice of the proposed sale having been given thereon, as

provided by law, no objections having been made to said sale, the same having taken place and said land having been sold to Security Mortgage Company of the City of Atlanta, State of Georgia, in said District, for $112,500.00, free of all liens, now coming on for confirmation as provided in such notice, and the attorney for the Trustee herein being present,

[fol. 29] It is ordered that such sale be and the same is hereby confirmed and that the Trustee herein, on receipt of the consideration in cash, complete the same by executing proper deed or deeds transferring to said purchaser all his right, title and interest in and to said property and delivering the same to said purchaser free of all liens including lien of taxes for 1926.

It is further ordered that the purchaser have a reasonable time, not less than ten days, for the purpose of examining the titles to said land in order to ascertain the existence of any other liens or defects in said title in order that the Trustee might have a reasonable time within which to cure said defects, if possible, and should said examination of title disclose any defect that would prevent the Trustee from delivering to petitioner a good and marketable title, that said petitioner be released from any obligation incurred by reason of having made said bid.

It is further ordered that the purchaser herein be allowed to perform the conditions of its said bid in part by giving credit on its secured debt for the amount of said secured debt as the same may be allowed including the claim for taxes held by the purchaser for the year 1925.

It is further ordered that it may further comply with its bid by assuming and agreeing to pay off taxes, both State and County and City, on said property for the year 1926, amounting in the aggregate to $2,880.60, and by paying in cash into Court the balance of its said bid of $112,500.00. It is agreed in open Court and so ordered that the lien of the petitioner attaches to the proceeds of the sale and that settlement with the trustee may be had by the cancellation of the lawful liens by the purchaser against said property without the necessity of actually paying the whole amount [fol. 30] in cash. It is provided, however, that the amount of said lien is not adjudicated by this order.

This the 15th day of June, 1926.

Harry Dodd, Referee.

In United States District Court

Petition of Security Mortgage Company Relative to Liens and Order Thereon—Filed June 29, 1926

Now comes the Security Mortgage Company and shows to the Court the following facts:

1

That it is the holder of a just and valid lien against the property of the above named bankrupt, having a priority over any other debts against said property.

2

That said lien exists by reason of:

(1) The transfer to it by T. C. Richardson, Tax Collector and Ex Officio Sheriff of the State of Georgia and County of Fulton, of a certain tax fi. fa. issued by the State of Georgia and County of Fulton against the Hanson Motor Company for State and County taxes for the year 1925. That Security Mortgage Company, on April 5th, 1926, paid to said Richardson the sum of $1,284.30 and said fi. fa. was duly transferred to petitioner and entered [fol. 31] on the General Execution Docket No. 42, Page 84, in the office of the Clerk of the Superior Court of Fulton County, Georgia.

(2) The transfer to it by W. E. Harwell, Marshal of the City of Atlanta, of a certain fi. fa. issued by the City of Atlanta against the Hanson Motor Company for city taxes for the year 1925. That Security Mortgage Company, on April 5th, 1926, paid to said Harwell the sum of $1,759.50 and said fi. fa. was duly transferred to petitioner and entered on the General Execution Docket No. 42, Page 84, in the office of the Clerk of the Superior Court of Fulton County, Georgia.

(3) That on the 24th day of February, 1925, the Hanson Motor Company executed a certain promissory note wherein it agreed to pay to the order of Security Mortgage Company the sum of $80,000.00 in five years from date, as

per copy of said note hereto attached and marked "Exhibit A." Said Hanson Motor Company at the same time executed ten interest coupons for $3,150.00, being for semi-annual interest of said principal sum of $90,000.00 at the rate of seven per cent per annum, as per copy of one of said interest coupons hereto attached and marked "Exhibit B."

(4) Said Hanson Motor Company having failed to comply with the terms of said note by failing to pay the interest coupon due on the 24th day of February, 1926, petitioner, on the 1st day of April, 1926, exercised its option to declare the principal note of $90,000.00 due and collectible, in accordance with the terms of said note.

(5) That on February 24, 1925, said Hanson Motor Company executed and delivered to petitioner, for the purpose [fol. 32] of securing payment of said note and the interest thereon, a loan deed conveying to said Security Mortgage Company a fee simple title to the land described in schedules of the above named bankrupt and in the application of the Trustee for an order to sell the same, said land being briefly described as being situate, lying and being in the County of Fulton on Land Lot 119 of the 14th District thereof and at the southwest corner of Sylvan Road and Murphy Avenue, fronting four hundred thirty-three and three-tenths (433.3) feet on Murphy Avenue and fronting seven hundred and four-tenths (700.4) feet, more or less, on Sylvan Road, being improved property and having thereon buildings used by the Hanson Motor Company in the manufacture of automobiles and later by the Florida Furniture Company in the manufacture of furniture.

(6) Said note and the interest coupons and the loan deed securing the same provide for the payment of ten per cent of the principal and interest due, if collected by law or through an attorney at law, and that having complied with all of the statutes of the State of Georgia with reference to the collection of attorney's fees in contracts providing therefor, petitioner filed suit to the City Court of Atlanta on said note, wherein it prayed for a judgment for principal, interest, attorneys' fees and costs of Court and that said amounts be declared a special lien upon the

land described in said loan deed and briefly described herein.

(7) That thereafter, to wit, on the 4th day of May, 1926, said case coming on to be heard, a verdict in favor of your petitioner was rendered for the principal sum of $93,150.00 and the sum of $1,274.00 interest to May 4, 1926, $9,442.00 at attorney's fees, and $15.85 costs of Court, and that Security Mortgage Company had a special lien upon the land [fol. 33] hereinabove referred to, whereupon, on the same date, a judgment in conformity with said verdict was rendered by said Court and entered upon the minutes thereof, wherein it was ordered that the plaintiff, Security Mortgage Company, have and recover of the defendant, Hanson Motor Company, the principal sum of $93,150.00 and the sum of $1,374.00 interest to date of judgment and future interest thereon in accordance with the terms of said note at the rate of 8 per cent per annum, $9,442.00 attorneys fees, $15.85 costs of court, and it was further ordered by the Court that an execution issue pursuant to the terms of the verdict and judgment and that said execution was adjudged to be a special lien upon the land described hereinabove.

(8) Pursuant to said judgment, an execution was issued and duly recorded on General Execution Docket No. 42, Page 126, of the records in the office of the Clerk of the Superior Court of Fulton County, Georgia.

(9) That subsequent to the execution, delivery and recording of the loan deed from Hanson Motor Company to Security Mortgage Company, above referred to, said Hanson Motor Company conveyed said land to the bankrupt, subject to all the terms and conditions of the notes and the loan deed from said Hanson Motor Company to Security Mortgage Company and said bankrupt, nor the Hanson Motor Company, have paid any part of said debts and there are no just set offs against the same.

Wherefore, petitioner prays that an order be passed by this Honorable Court declaring petitioner's liens to be prior liens upon the land or any funds derived from the sale of said lands in said Court as follows:

[fol. 34] By reason of State and County tax fi. fa. against Hanson Motor Company for the year, 1925, duly transferred to Security Mortgage Company, in the sum of	$1,284.30
Interest at the rate of 7% per annum from April 5th, 1926	
City tax fi. fa. against Hanson Motor Company for the year, 1925, duly transferred to Security Mortgage Company, in the sum of	1,759.50
Interest at the rate of 7% per annum from April 5th, 1926	
Judgment against Hanson Motor Company, Principal	93,150.00
Interest to May 4th, 1926	1,274.00
Interest from May 4th, 1926, at 8% per annum	
Attorney's fees	9,442.40
Costs of Court	15.85

and that said amount be allowed as a credit on the bid of Security Mortgage Co. it having been the highest and best bidder at the sale of said land by this honorable Court.

Candler, Thomson & Hirsch, Attorneys for Security Mortgage Company.

Duly sworn to by Asa W. Candler. Jurat omitted in printing.

[fol. 35] EXHIBIT A TO PETITION

$90,000.00. Atlanta, Ga., February 24, 1925.

February 24th, 1930, — months after date I promise to pay to the order of Security Mortgage Company, Ninety thousand and 00/100 Dollars, in gold coin of the United States or its equivalent for value received.

With interest after maturity until paid at eight per cent per annum with all costs of collection, including ten per cent as attorney's fees, if collected by law or through an attorney at law. Each of us, whether principal, security, guarantor, indorser, or other party hereto, hereby severally

waive and renounces each for himself and family, any and all homestead rights, either of us or the family of either of us, may have under or by virtue of the constitution or laws of Georgia, any other state, or the United States, as against this debt or any renewal thereof; and each further waives demand, protest and notice of demand, protest and non payment. It is also expressly agreed and understood, if this note, or any part thereof, is not paid when due that all other notes outstanding, bearing even date with these pres- [fol. 36] ents, and given for the same intent and purpose as this note, shall, at the option of the holder, become due and collectible—time being of the essence of this contract.

Given under the hand and seal of each party.

Hanson Motor Company, by G. W. Hanson, Prst. (Seal) by John Aldredge, Sect. (Seal.)

Due ——, ——
Address: ——.

EXHIBIT B TO PETITION

$3,150.00 Atlanta, Ga., February 24, 1925

February 24th, 1926, — months after date I promise to pay to the order of Security Mortgage Company, Thirty-one Hundred Fifty and 00/100 Dollars, in gold coin of the United States or its equivalent for value received.

With interest after maturity until paid at eight per cent per annum with all costs of collection, including ten per cent as attorney's fees, if collected by law or through an attorney at law. Each of us, whether principal, security, guarantor, endorser, or other party hereto, hereby severally waives and renounces each for himself and family, any and all homestead rights, either of us or the family of either of us, may have under or by virtue of the constitution or laws of Georgia, any other state, or the United States, as against this debt or any renewal thereof; and each further waives demand, protest and notice of demand, protest and non payment. It is also expressly agreed and understood, if this note, or any part thereof, is not paid when due that all other notes outstanding, bearing even date with these presents, and given for the same intent and purpose as this

[fol. 37] note, shall, at the option of the holder, become due and collectible—time being of the essence of this contract.

Given under the hand and seal of each party.

Hanson Motor Company, by G. W. Hanson, Prest., (Seal), by John Aldredge, Sect. (Seal.)

Interest Coupon No. 2.

Due ——— —, ———.

Address: ———.

This claim is allowed and ordered paid out of the proceeds from the sale of real estate and the objections of the Trustee are over ruled on each and every ground.

June 25th, 1926.

Harry Dodd, Referee.

IN UNITED STATES DISTRICT COURT

OBJECTIONS OF THE TRUSTEE TO THE ALLOWANCE OF THE CLAIM OF SECURITY MORTGAGE COMPANY—Filed June 29, 1926

Now comes Charles A. Powers, trustee for the estate of the above named bankrupt, as respondent, and to the petition of The Security Mortgage Company filed in this Court on the 15th day of June, 1926, setting up a claim of lien to the fund arising from the sale of the real estate, the sale of which was confirmed on the 15th day of June, 1926, respectfully shows:

[fol. 38] As affecting the right of the said Security Mortgage Company to a lien on the funds in question, your trustee shows:

That the Florida Furniture Company was adjudicated a bankrupt upon its voluntary petition in the District Court of the United States for the Southern District of Florida, at Jacksonville, Fla., on the 7th day of January, 1926; that ancillary proceedings were filed in this Court on the 11th day of January, 1926; that, thereafter, in January, 1926, respondent was elected trustee in said Southern District of Florida; that upon a petition of respondent, as trustee, filed in this Court, February 6th, 1926, R. A. Burnett, residing

in this district, was named as associate and assistant to your trustee in this case and the ancillary proceedings, then pending in this Court, were referred to Honorable Harry Dodd, as Referee.

That, thereafter, on the 12th day of March, 1926, upon the written application of respondent, as trustee, seeking to sell the real estate free from the lien of The Security Mortgage Company, an order was entered for the Security Mortgage Company to show cause before this Court on the 17th day of March, 1926, why the application to sell the real estate should not be granted; that a copy of such petition and order to show cause was served upon The Security Mortgage Company on the 13th day of March, 1926; that on the return day of said rule, the motion for an order to sell was continued from time to time as follows: From March 17th, 1926, to March 19th, 1926; from March 19th, 1926, to March 30th, 1926; from March 30th, 1926, to April 7th, 1926; on April 7th, 1926, the rule was postponed and an order of sale was entered on May 14th, 1926, and the final order directing the sale on June 2nd, 1926, all of which will appear more fully of record in the files of this [fol. 39] case; that pursuant to the petition of the trustee and the order to show cause thereon and service of the same upon The Security Mortgage Company, the said Security Mortgage Company, by its counsel, appeared in Court at the various times mentioned when the application for a sale was continued and postponed from time to time because of proceedings pending in Jacksonville to vacate the order of adjudication, but the Security Mortgage Company, at the various times when the question for taking an order of sale was up before the Court, was represented by counsel at the proceedings and at no time made objections to the sale of the property by the trustee free from its liens, it having been directed to make objections, if any it had, by the original show cause order.

That about said date, to wit, February 24th, 1926, an interest note became due, that at the time of bankruptcy and at the time of the appointment of your respondent as trustee, and at the time of bringing the application for the sale of the real estate, the indebtedness due the Security Mortgage Company had not become due, the same having

been declared due on the 1st day of April, 1926; that thereafter about the 13th day of April, 1926, suit was instituted in the City Court of Atlanta upon the notes set out in the petition of Security Mortgage Company and judgment against Hanson Motor Co. was rendered on the 4th day of May, 1926, as alleged in the petition of Security Mortgage Company; that in said judgment, a special lien was set up as against the real estate which was then in this Court for administration and as above set forth, and which property was sold on the 15th day of June, 1926, by this Court; that the loan deed and the notes sued upon were given by the Hanson Motor Company, a corporation of Atlanta, Georgia, but that the bankrupt herein took over the property by a deed from the Hanson Motor Company about the 1st day of July, 1925, in which the bankrupt, in consideration of the [fol. 40] transfer of said real estate, assumed the indebtedness due the Security Mortgage Company; that a copy of the resolution of the bankrupt company, in which the trade between the two companies was consummated, is attached hereto as Exhibit "A"; that the judgment of the City Court of Atlanta is attempting to fix a lien upon the property then in the custody of your petitioner, as trustee, was rendered without notice and as far as your petitioner is concerned, was procured ex parte; that the Hanson Motor Company at the time of entering the judgment in the City Court of Atlanta, was and still is, absolutely insolvent, all of its assets having been transferred to the bankrupt, as aforesaid; that the act of entering the judgment in the City Court of Atlanta was an attempt to increase the amount of the lien in favor of the Security Mortgage Company as against the property in the custody of this Court, by evading the jurisdiction of this Court, and without permitting this Court to pass on and adjudicate such question.

Your trustee objects to the allowance of that part of the claim of the Security Mortgage Company, as set out in its said petition, which seeks to have attorney's fees amounting to $9,442.80 allowed and also objects to the payment of the Court costs incurred in the said proceedings; that Security Mortgage Company should also be taxed with costs of the foreclosure in this Court, including Referee's fees and trustee's fees, costs of preserving the property, attorney's

fees, and such other expenses as are proper in such cases. Your trustee says that the lien, under the loan deed as it existed without a judgment in the City Court of Atlanta, together with interest is a valid lien and should be recognized and paid out of the proceeds brought from the sale of the property; that also, all taxes that have been paid by the Security Mortgage Company should be refunded.

[fol. 41] Your trustee bases his objections to the allowance of the item of $9,442.80, claimed as attorney's fees under the Fi Fa issued out of the City Court of Atlanta, upon the following grounds, to-wit:

1. At the time of fixing the lien on the property in question for the attorney's fees, this Court had exclusive jurisdiction of both the parties and the subject matter; that, inasmuch, as the exclusive jurisdiction was in this Court, the City Court of Atlanta, had no jurisdiction to fix a lien which would affect the property in question, and so the judgment in the City Court of Atlanta, as far as the rights of the parties at interest in this proceeding are concerned, is void.

2. The claim for attorney's fees was not a claim that was "absolutely owing" at the time of bankruptcy as required by Section 63-*a* of the Bankruptcy Act, the claim then being contingent; the judgment, as to attorney's fees, which was obtained after bankruptcy, is not founded upon a provable debt, and the judgment would be stripped of costs and interest accrued after the filing of the petition.

3. The lien sought to be established by the judgment of the City Court of Atlanta, is vitiated by Section 67 of the Bankruptcy Act, under all the facts and circumstances of the case; that the lien for attorney's fees under said judgment was accepted in order to circumvent the effect of the Bankruptcy Act, and so was in contemplation of this Act as specified in said Section 67-*d*; that likewise the lien for attorney's fees is void under said section because liens are to be held valid "to the extent of such present consideration only"; that at the time said lien was attempted to be fastened, the bankrupt was insolvent, and to allow and pay the attorney's fees would work a preference.

[fol. 42] 4. Assuming that the judgment of the City Court of Atlanta established a lien against the property for attor-

ney's fees is valid, and that its validity arises under the terms of the note and loan deed, yet respondent says that such judgment would have a lien under the statute of Georgia only from the date of its rendition and not from the date of the loan deed, and that the judgment in favor of creditors existing as a matter of law under the Bankruptcy Act would, and does antedate the date of the lien of the judgment for attorney's fees, and, therefore, could at most be a judgment junior to the judgment in favor of creditors.

5. The judgment in the City Court of Atlanta, as far as the interests of your respondent, as trustee, are concerned, and the effect it would have upon the property then belonging to him, was ex-parte and your respondent, therefore, is not bound by such judgment, even though a loan deed was being foreclosed which had been given by its predecessor in title.

6. The claim for attorney's fees is without equity to support it; that Security Mortgage Company, at the time of declaring its debt due and at the time of instituting suit and taking judgment, was a party to the proceeding for a foreclosure and sale of this same property in this Court, and all its rights were being fully protected as far as establishing a lien for the indebtedness due and upon the property in question, and the act of taking proceedings in another Court for the purpose of fastening a lien upon the property, in custodia legis, was unnecessary, and done with the purpose of increasing the lien without a corresponding benefit to the estate; that it was recognized by the Security Mortgage Company that its claim for attorney's fees was not a valid claim in this Court, and that the act of taking [fol. 43] the judgment aforesaid was done to circumvent the law and the equitable rights of creditors of this estate.

Walter S. Dillon, Clarence H. Calhoun, Attorneys for Chas. A. Powers, Trustee.

EXHIBIT "A" TO OBJECTIONS

Resolved further, that this corporation purchase from Hanson Motor Company, a corporation of Atlanta, Georgia, all of its real estate located in Georgia, and all of its real

estate located in Duval County, Florida, and all of its personal property, accounts and bills receivable and choses in action, and that this corporation assume and agree to pay all of the present obligations of said Hanson Motor Company whether the same be its direct obligations or obligations against any of its properties, and that this corporation pay for said assets as hereinbefore described by issuing and delivering to said Hanson Motor Company so many shares of the Non-Voting Class A Common Stock as hereinbefore provided for equal to the number of shares the common stock of Hanson Motor Company now outstanding, and which said Hanson Motor Company is now obligated to issue, and by issuing and delivering to said Hanson Motor Company 1250 shares of the Class B Preferred Stock of this Corporation in the form as heretofore approved at this meeting.

The Hanson Motor Company then presented to the corporation deed to the Atlanta properties, which was accepted and deed to the Florida property which was accepted, and said Hanson Motor Company also presented to the corporation a bill of sale and contract transferring to this corporation all of its rights to personal property, [fol. 44] choses in action and interests of every other kind and character and which embodies all the agreements of the parties, which contract was read at the meeting, and the President and the Secretary of the corporation are directed to execute the same on its behalf and affix its seal in duplicate, and to give said Hanson Motor Company a signed copy thereof.

In United States District Court

Petition to Review Referee's Order—Filed June 29, 1926

To Harry Dodd, Esquire, Referee in Bankruptcy:

Your petitioner, Charles A. Powers, respectfully shows:

1

That he is trustee for the estate of the above named bankrupt, duly qualified and acting.

2

That in the course of proceedings, the Security Mortgage Company filed is petition, setting up a claim to the funds arising from the sale of the real estate herein and to which petition, your petitioner herein filed objections to the allowance thereof in the full amount as prayed for; that the objections of your petitioner to the allowance of said claim came on for hearing on the 25th day of June, 1926, at which time an order was entered allowing the claim of the Security Mortgage Company, in full, and over-ruling the objections of your petitioner, which order was in substance as follows:

[fol. 45] "This claim is allowed and ordered paid out of the proceeds from the sale of real estate and the objections of the trustee are over ruled on each and every ground, June 25th, 1926. Harry Dodd, Referee."

3

That such order was, and is, erroneous, in that it was contrary to law and contrary to the evidence, and the Referee should have disallowed the item of attorney's fees amounting to $9,442.00 upon the grounds stated, and your petitioner says that his objections to the allowance of attorney's fees should have been, as a matter of law, sustained, and the attorney's fees disallowed.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankruptcy Act of 1898 and General Order 27.

Dated this — day of June, 1926.

Charles A. Powers, Petitioner, by Dillon, Calhoun & Dillon, His Attorneys.

Duly sworn to by Walter S. Dillon. Jurat omitted in printing.

[fol. 46] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF HARRY DODD, REFEREE—Filed June 29, 1926

To the Hon. Samuel H. Sibley, Judge:

I, the undersigned referee, do hereby certify that in the course of the proceedings in the above stated case the following question arose:

The trustee made application for leave to sell certain real estate free of liens. The first lien creditor holding a claim against the real estate was the Security Mortgage Co. Said claim was for the principal sum of $90,000.00 to which has been added interest and transfers of certain tax fi. fas. The trustee applied in his own name for the order of sale. A rule was issued directing the Security Moregage Co., to show cause why said sale should not be made free of its lien. The Security Mortgage Co., offered no reason. An order of sale was granted by the undersigned referee after several continuances. The continuance of the sale was made in part because, on April 6, 1926, after the application for sale had been made on March 12, 1926, the Hon. Rhydon M. Call, Judge of the District Court of the United States for the Southern District of Florida, the jurisdiction in which said bankruptcy proceedings originated, granted an order, a certified copy of which was filed with the undersigned referee, directing the trustee to make no application to the Court in the Northern District of the State of Georgia or elsewhere for the sale of any of the assets of the Florida Furniture Corp., nor to proceed further under any application that may have been made for such sale. A copy of said order, duly certified by the Clerk of the District Court of the United States for the Southern District of Florida is of file in the record in this case and is transmitted with this certificate.

[fol. 47] Acting upon the information contained in said order, the undersigned referee directed that the trustee's petition to sell be postponed until the further order of this Court. Thereafter, on or about the 14th day of May, 1926, the Honorable Judge of the District Court for the Southern District of Florida issued another order vacating the previous stay order, a copy of said order, not certified, is likewise attached to the record in this case and transmitted with the papers.

On the 14th day of May, 1926, the undersigned referee signed an order directing a sale of the property, free of liens, fixing in said order the date of sale as May 28, 1926. At the time and place named in said order no satisfactory offer for the property was received and no sale was confirmed. Later, on June 2, 1926, the trustee renewed the petition for sale, and an order was granted by the referee on the application of the trustee, fixing the date of sale as June 12, 1926, at which time the property was sold to the Security Mortgage Co. at and for the sum of $112,500.00, free of all liens. The trustee filed an application with the referee for direction as to confirmation of said sale, and the Security Mortgage Co., purchaser at said sale, likewise filed an application for the confirmation of the sale. On the 15th day of June, 1926, after hearing the parties at interest, the undersigned referee confirmed the sale of the property free of liens to the Security Mortgage Co., and no exceptions have been taken to the order confirming said sale.

Thereupon the Security Mortgage Co. filed its claim of lien and asked that said claim be allowed as a credit on the bid of the Security Mortgage Co. Thereupon the trustee filed exceptions to the allowance of said claim, and the issue for determination is on the order over-ruling the exceptions and allowing the claim as proved. The objections of the trustee to the claim of the Security Mortgage Co. [fol. 48] seek to disallow one item in the claim of $9,422.40 as attorney's fees. The referee's order allowed the claim for attorney's fees and the exception is on that issue.

The facts are not in controversy and may be briefly stated as follows:

The Florida Furniture Corp., purchased the real estate in question from the Hanson Motor Co. The Florida Furniture Corp., purchased said real estate subject to a lien evidenced by a loan deed made by the Hanson Motor Co., to the Security Mortgage Co., and assumed and agreed to pay said lien as a part of the consideration of the purchase. The note and deed evidencing the debt between the Hanson Motor Co. and the Security Mortgage Co., provide for the payment of 10% attorney's fees in the event the debt or the interest coupons were not paid as and when due, and in the event that the debt was collected by or

through an attorney at law. The security deed in question is dated the 24th day of February, 1925. An interest coupon was due on the 24th day of February, 1926. On April 1, 1926, the Security Mortgage Co. exercised its option to declare the principal note of $90,000.00 due and collectable in accordance with the terms of said note. The Florida Furniture Corp. was adjudicated to be a voluntary bankrupt on the 7th day of January, 1926. On the 1st day of April, 1926, the Security Mortgage Co., declared the debt due and gave the required notice to the Hanson Motor Co., of its intention to sue said claim in the City Court of Atlanta, and to claim in said suit the attorney's fees provided for in said note. On the 13th day of April, 1926, suit was instituted in the City Court of Atlanta upon the notes of the Hanson Motor Co., and judgment was rendered against the Hanson Motor Co., on the 4th day of May, 1926. Said judgment was made a special lien against the real estate in question. The real estate in question was then in the possession of a receiver appointed by this Court in [fol. 49] the ancillary jurisdiction; said receiver, R. A. Burnett, having been appointed on the 11th day of January, 1926. Execution was issued by the City Court against the Hanson Motor Co. and said execution by the City Court of Atlanta was adjudged to be a special lien upon the land in question. The execution was recorded on General Execution Docket 42, Page 126, of the records of the office of the Clerk of the Superior Court of Fulton County, Ga.

The sale of the property to the Security Mortgage Co., has been confirmed but at the date of the issuance of this certificate, the formal transfer by deed of the trustee to the Security Mortgage Co. has not been made, and the property remains in the possession of R. A. Burnett, as receiver in the ancillary jurisdiction. The transfer is being delayed pending the examination and approval of the title.

The referee allowed the attorney's fees for which judgment was rendered prior to the sale and prior to the date of the proof of the claim of the Security Mortgage Co., on the ground that the Florida Furniture Corp., bankrupt, having taken the property by deed subject to all of the conditions of the outstanding loan deed, is bound by said deed and all of the terms and conditions thereof; that the

trustee of the Florida Furniture Corp., is likewise bound; the right to assert and claim attorney's fees inheres in the original contract between the Hanson Motor Co. and the Security Mortgage Co.; that the trustee for the Florida Furniture Corp., took title subject to the rights of the Security Mortgage Co. under its contract with the Hanson Motor Co.

As necessary to the understanding of the issue raised, I transmit herewith:

(1) A certified copy of the proceedings from the District Court for the Southern District of Florida, to which is attached a copy of the order of adjudication and the order appointing a receiver.

[fol. 50] (2) The trustee's application for leave to sell the real estate, with various entries of service thereon, and order adjourning a proposed sale, filed March 12, 1926 [1926]. Also the renewal of the petition to sell and order endorsed thereon directing a sale, filed June 2, 1926.

(3) A certified copy of the order of the Judge of the District Court of the Southern District of Florida and the order endorsed thereon by the referee postponing the sale until the further order.

(4) The petition and order for confirmation of the sale, filed June 15, 1926.

(5) The Proof of Claim of the Security Mortgage Co., and the order allowing the same and over-ruling the objections of the trustee. Also the trustee's objections to said claim.

(6) The petition to review the referee's order allowing the claim.

This the 28th day of June, 1926.
Respectfully submitted,

Harry Dodd, Referee.

In United States District Court

Judgment Disallowing Lien of Attorney's Fees—Filed July 27, 1926

The petition of Charles A. Powers, Trustee in the above stated case to review an order of the Referee, allowing the claim of lien for Attorney's fees and ordering the same [fol. 51] paid out of the proceeds from the sale of real estate in the hands of the trustee, upon which the Security Mortgage Company claim a lien for attorney's fees on the real estate in the hands of the Trustee, by virtue of a judgment of the State Court, and to which claim Powers' Trustee filed objections which were over ruled on each and every ground, by the Referee, coming on to be heard, and after a hearing, the claim of lien of the Security Mortgage Company, objected to by Trustee, is disallowed as a lien upon the funds arising from the sale of real estate in the hands of the Trustee, and the order of the Referee heretofore made on June 25th, 1926, over ruling the objections filed by the Trustee to the allowance of the claim and over ruling the objections heretofore filed by the Trustee to the allowance of the claim of Attorney's fees as a lien, and ordering the same paid from the funds derived from the sale of real estate, is over ruled, and the claim of lien on the funds derived from the sale of real estate is denied, except for principal, interest and costs.

Dated this 26 day of July, 1926.

Sam'l H. Sibley, U. S. Judge.

In United States District Court

Stipulation as to Correctness of Parts—Filed Oct. 23, 1926

The undersigned, counsel of record in the above stated case hereby stipulate and agree that the facts set out in the certificate of Harry Dodd, Referee, to the Judge on the question of the allowance of the claim of Security Mortgage Company, filed in office June 29th, 1926, are true and that [fol. 52] said certificate contains all of the facts necessary

to a clear understanding of the issue made on appeal to the Circuit Court of the United States for the Fifth Circuit.

Candler, Thomson & Hirsch, Counsel for Security Mortgage Co., 1415 Candler Building, Atlanta, Ga. Asa W. Candler, of Counsel. Dillon, Calhoun & Dillon, Counsel for Chas. A. Powers, Trustee in Bankruptcy for Florida Furniture Corporation, 1045 Hurt Building, Atlanta, Ga. Clarence A. Calhoun, of Counsel.

In United States District Court

Petition for Appeal and Order Allowing Same—Filed Oct. 23, 1926

To the Hon. Samuel H. Sibley, District Judge:

The Security Mortgage Company feeling aggrieved by a decree rendered and entered in the above entitled cause on the 26th day of July, 1926, does hereby appeal from said decree to the Circuit Court of Appeals for the Fifth Circuit for the reasons set forth in the assignment of errors filed herewith and it prays that its appeal be allowed and that Citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United [fol. 53] States Circuit Court of Appeals for the Fifth Circuit under the rules of such Court in such cases made and provided, and your petitioner further prays that the proper order relating to the required security to be required of it be made.

Candler, Thomson & Hirsch, Attorneys for Security Mortgage Company. Asa W. Candler, of Counsel.

Order Granting Appeal

The appeal of the said Security Mortgage Company is allowed and shall operate as a supersedeas upon said company filing a bond in the sum of $250.00 with sufficient sureties to be conditioned as required by law.

This, October 23, 1926.

Sam'l H. Sibley, United States Judge.

In United States District Court

Assignments of Error—Filed Oct. 23, 1926

Now comes the Security Mortgage Company, intervener in the above entitled cause, and filed the following assignments of error, upon which it will rely its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 26th day of July, 1926;

1. That the Court erred in disallowing the lien of attorneys' fees in the sum of $9,442.40 against the proceeds of [fol. 54] the property in the hands of the trustee in bankruptcy, although allowing appellant's lien for the principal, interest and costs.

2. Because the Court erred in not holding the judgment obtained by appellant in the City Court of Atlanta with regard to principal, interest costs and attorneys' fees, to be and constitute a prior lien on the funds in the hands of said trustee in bankruptcy as the proceeds of the sale of the real estate made by said trustee.

3. Because the Court erred in sustaining the objection made by the trustee to the intervention filed by appellant herein and in declining to set up as a good and valid claim of lien on the funds the principal, interest, costs and attorneys' fees on the judgment obtained by appellant in the City Court of Atlanta.

Wherefore, appellant, Security Mortgage Company, prays that said decree be reversed and that the Circuit Court of Appeals render such decree or order as may be proper on the record or that the Trial Judge of the District Court of the United States for the Northern District of Georgia, Atlanta Division, be instructed to enter such order or decree, as will charge said real estate with the full lien claimed by the said Security Mortgage Company for principal, interest, costs and attorneys' fees, and that said trustee in bankruptcy be instructed and ordered to pay said lien claim of the Security Mortgage Company in full.

Candler, Thomson & Hirsch, Attorneys for Appellant, Security Mortgage Company. Asa W. Candler, of Counsel.

[fol. 55] Bond on appeal for $250.00, approved and filed October 26, 1926, omitted in printing.

[fol. 56] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed October 23, 1926

To the Clerk of the United States Court for the Northern District of Georgia:

Please prepare a transcript of the record of the above named cause on appeal to the Circuit Court of Appeals of the United States for the Fifth Circuit, containing the following items:

1. Certified copy of the proceedings from the District Court of the United States for the Southern District of Florida, to which is attached a copy of the order of adjudication and the order appointing a receiver.

[fol. 57] 2. Certified copy of order of the District Court of the United States for the Southern District of Florida, postponing sale of the real estate, filed in the office of the Referee April 7th, 1926, and filed in the Clerk's office of this Court June 29th, 1926.

3. Trustee's application for leave to sell real estate with various entries of service thereon and the order adjoining proposed sale, filed March 12th, 1926.

4. Renewal of trustee's petition to sell and order indorsed thereon directing a sale, filed June 2nd, 1926.

5. Petition and order for confirmation of the sale, filed June 15th, 1926.

6. Proof of claim of the Security Mortgage Company and the order allowing same and overruling the objections of the trustee. Also, the trustee's objection to said claim.

7. The petition to review the Referee's order allowing the claim.

8. Certificate of Harry Dodd, Referee, on question of the allowance of the claim of the Security Mortgage Company, filed in office June 29th, 1926.

9. Order of Hon. Samuel H. Sibley, United States Judge for the Northern District of Georgia, Atlanta Division,

dated July 26th, 1926, on the petition to review and disallowing the lien sought by the Security Mortgage Company.

10. Stipulation as to facts signed by counsel of record.

11. The petition for appeal.

12. The order granting the appeal.

13. The assignments of error.

[fol. 58] 14. The costs and supersedeas bond, and order approving the same.

15. The citation on appeal with acknowledgment of service thereon.

16. The præcipe.

17. The Clerk's certificate and certificate of costs.

18. The entries of filing each and all the parts of the record above specified.

Candler, Thomson & Hirsch, Attorneys for Security Mortgage Co., by Asa W. Candler. Asa W. Candler, of Counsel.

Due and legal service of the above and foregoing præcipe is hereby admitted. This 23rd day of October, 1926.

Dillon, Calhoun & Dillon, Attorneys for Chas. A. Powers, Trustee in Bankruptcy for Florida Furniture Corporation, Bankrupt. Walter S. Dillon, of Counsel.

[fol. 59] Clerk's certificate to foregoing, omitted in printing.

NOTE RE CITATION

Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 60] Minute entry of argument and submission, Oct. 3, 1927, omitted in printing.

[fol. 61] In United States Circuit Court of Appeals
Fifth Circuit

No. 5012

Security Mortgage Company, Appellant,

versus

Charles A. Powers, Trustee in Bankruptcy for Florida Furniture Corporation, Bankrupt, Appellee.

Before Walker, Bryan and Foster, Circuit Judges

Opinion—Filed Oct. 25, 1927

Foster, Circuit Judge:

In this case the material facts, which are stipulated, are these. The Florida Furniture Corporation was adjudicated bankrupt on January 7, 1926, and surrendered certain real estate purchased from the Hanson Motor Company, prior thereto, which property was burdened with a mortgage of $90,000 held by appellant. The deed of trust contained a provision for ten per cent attorneys' fees in the event [fol. 62] for foreclosure. At the time of adjudication in bankruptcy there was nothing due on the mortgage either in principle or interest but on February 24, 1926, an interest coupon fell due which was not paid. Pursuant to a clause in the mortgage, appellant declared the entire debt due on April 1, 1926, gave notice of intention to sue and brought suit in the City Court of Atlanta against the Hanson Motor Co. to foreclose the mortgage. Judgment was rendered by that Court May 4, 1926 for principle and interest due and attorneys' fees in the sum of $9,442.40, and execution was ordered to issue against the property. The property then was and had been in the actual custody of the bankrupt court, through the trustee, or a receiver, from the date of adjudication. Thereafter, on application of the trustee, appellee herein, the property was sold in the bankruptcy proceedings on June 12 1926, free of liens, without objection and was bought in by appellant for $112,500. Appellant then filed its claim for payment by preference out of the proceeds for the amount due under the mortgage, principle and interest, and attorneys' fees. The trustee ob-

jected to the allowance of the attorneys' fees, but the referee ruled against him, which ruling was subsequently reversed by the District Court. The only question presented on this appeal is as to the correctness of the order disallowing the attorneys' fees.

Appellant relies upon the provision of the Georgia code, par. 6037, permitting transfers of real estate burdened by a mortgage and deed of trust to be disregarded by the mortgage creditor and allowing suit to be brought against the original debtor, and cites John M. Mitchell Life Insurance Co. vs. Ross, Receiver, 162 Ga. 654, and Scott vs. Paisley, 271 U. S. 632. We conclude that this is beside the issue.

The attorneys' fees claimed were not a fixed liability at the time of bankruptcy and became a lien on the property, if at all, merely by virtue of the judgment of the State Court. There is no doubt that the property passed into [fol. 63] the custody of the District Court sitting in bankruptcy with the adjudication and no other court had jurisdiction to impress it with a lien not then in existence. Murphy vs. John Hoffman Co., 241 U. S. 586; in re Joseph Webre, 219 F. 417; In re Jno. T. Moore Planting Co., 237 F. 737.

As the rights of appellant could have been amply protected in the District Court, there was no occasion for the foreclosure.

We have repeatedly held that under similar conditions a claim for attorneys' fees is not allowable against the fund arising from the sale of mortgaged property in the hands of the trustee. In re Roach, 101 F. 956; Labaree vs. Citizens' Bank, 193 F. 648; British & American Mortgage Co., vs. Stuart, 210 F. 425.

We find no error in the record.

Affirmed.

[fol. 64] In United States Circuit Court of Appeals

[Title omitted]

Judgment—October 25, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Security Mortgage Company, and the surety on the appeal bond herein, American Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 65] In United States Circuit Court of Appeals, Fifth Circuit

[Title omitted]

Petition for Stay of Mandate—Filed November 18, 1927

To Hon. Rufus E. Foster, Judge United States Circuit Court of Appeals:

Now comes Security Mortgage Company, Appellant, and shows that it desires and intends to cause to be presented to a Judge of the Supreme Court of the United States, a petition for certiorari, to have the judgment of the Honorable Court in above stated case reviewed by the Supreme Court of the United States.

This petition is brought to your Honor in accordance with the Rules as formulated after approval on February 13th, 1925, and which became effective May 13th, 1925, particularly Subsection "D", of Section 8 of said Rules as promulgated.

It is shown it will take some time to prepare and have such petition for certiorari presented, as provided by law, and your Honor is hereby petitioned to grant a stay of execution of the decree and judgment, in said case, for the [fol. 66] statutory period of ninety (90) days from the date of the affirmance, which was October 25th, 1927, and the last day will be January 23rd, 1928, which petitioner shows is under the circumstances a reasonable time.

Appellant is prepared to enter into the bond required by said Section, and is hereby tendering to your Honor for approval, bond conditioned as provided in said Rules, which

it prays to have approved by your Honor, or that your Honor designate some official to whom same may be presented for approval.

Wherefore, appellant prays that your Honor will grant this petition, and order stay of execution for a period of ninety (90) days from the date of the judgment of affirmance, on October 25th, 1927, and until January 23rd, 1928.

(Signed) John E. Benton, Aldine & Hewitt W. Chambers, by Hewitt W. Chambers, Attorneys for Appellant.

[fol. 67] In United States Circuit Court of Appeals

[Title omitted]

Order Staying Mandate—November 18, 1927

Considering the application of the appellant in the above case, it is ordered that the mandate of this court be, and it is hereby withheld for a period of sixty (60) days from this date, provided that the appellant give bond in the sum of $1,000.00, to be approved by the undersigned, and with the condition that if the appellant fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages and costs which the appellee may sustain by reason of the delay;—said mandate to be issued at the expiration of the above stated time unless the application of the appellant for a writ of certiorari shall [fol. 68] then have been submitted to the said Supreme Court.

New Orleans, La., November 18th, 1927.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fols. 69 & 70] Bond for $1,000.00 approved; omitted in printing.

[fol. 71] Clerk's certificate to foregoing omitted in printing.

[fol. 72] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 23, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the procedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,114. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 662. Security Mortgage Company, petitioner, vs. Charles A. Powers, trustee in bankruptcy for Florida Furniture Corporation, bankrupt. Petition for writ of certiorari and exhibit thereto. Filed December 23d, 1927. File No. 33,114.

DEC 23 1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 6[redacted]32

SECURITY MORTGAGE COMPANY,
Petitioner,

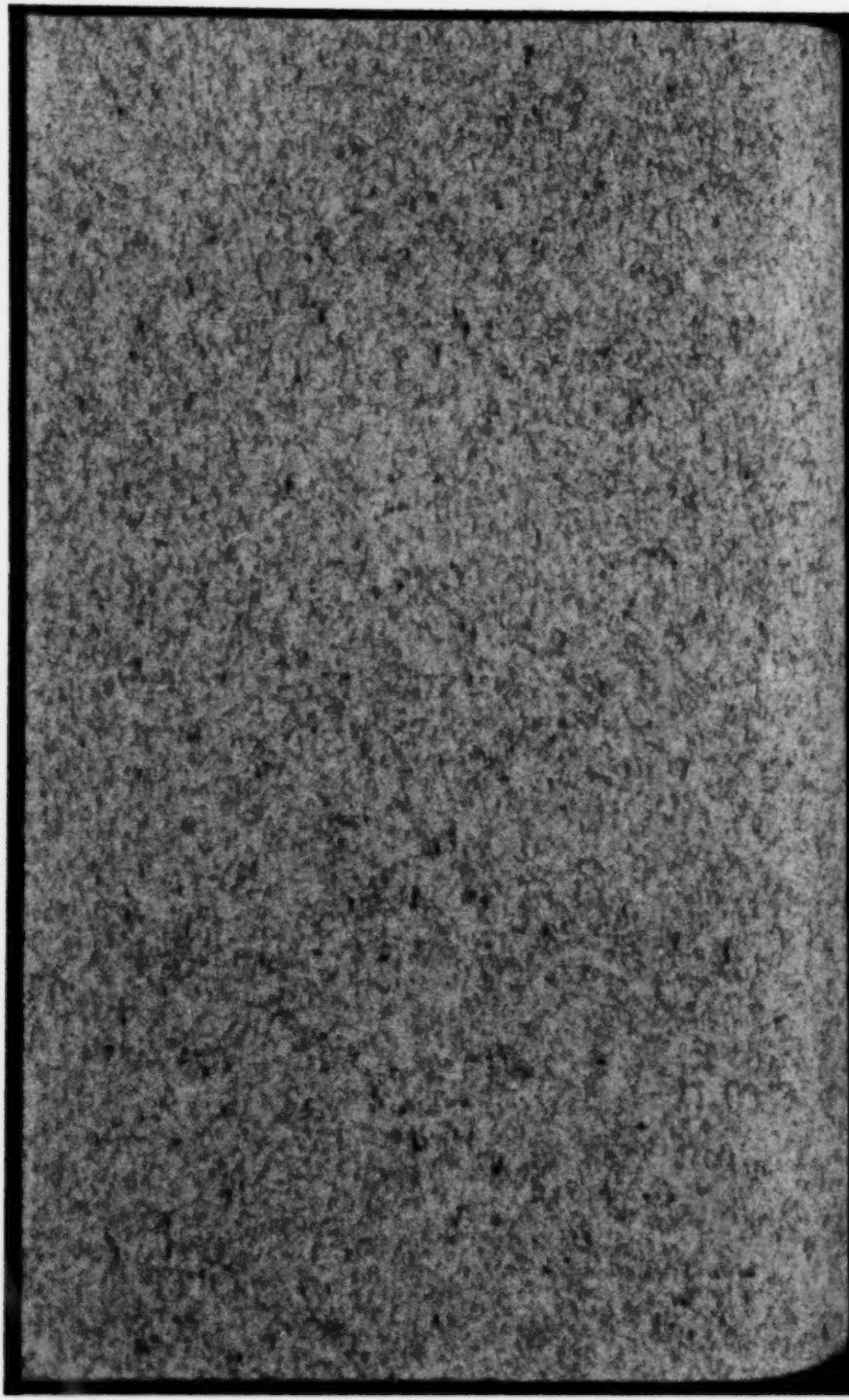
vs.

CHARLES A. POWERS, TREASURER OF RAPPAHANNOCK FOR FISCAL PURPOSES COMMONWEALTH, RAPPAHANNOCK,
Respondent.

Petition for Writ of Certiorari and Brief in Support of Petition.

ARNOLD & HAWKES W. CRAWFORD,
607-8-9 Peters Building,
Atlanta, Georgia.
JOHN E. BARROW,
602-3 Ohio Building,
Washington, D. C.
Counsel for Petitioner.

Brief of Record Printing, Washington, D. C.



INDEX.

	Page
PETITION FOR WRIT OF CERTIORARI....	1
BRIEF IN SUPPORT OF PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI..	10
Reference to Opinions Below	10
Statement of Grounds of Jurisdiction Invoked..	10
Statement of the Case	11
Specification of Error	15
ARGUMENT	15
Summary	15
Under the Law of Georgia the Petitioner's Lien, as Created by the Loan Deed to it, was Unaffected by Subsequent Transfer of the Equity in the Property Covered by said Deed.....	16
Under the Law of Georgia Attorneys' Fees Stipulated for in a Note Are a Part of the Principal Indebtedness, and a Lien Securing the Debt Represented by the Note Secures also the Attorneys' Fees	19
Section 67d of the Bankruptcy Act Preserves the Petitioner's Lien	22
Section 63d of the Bankruptcy Act has no Application to Petitioner's Claim	23
Recognition of the Petitioner's Claim is in no Way Inconsistent with Either the Letter or the Spirit of the Bankruptcy Act	29
The Judgment of the Circuit Court of Appeals is in Conflict with Applicable Local Decisions	37
The Judgment of the Circuit Court of Appeals is in Conflict with the Decisions of Other Federal Courts	38

CASES CITED.

Page

British & American Mortgage Co. v. Stuart, 210 F. 425 39
Dunbar v. Dunbar, 190 U. S. 340 28
Edenfeld v. Bank of Millen, 7 Ga. App. 645 (67 S. E. 896) 25, 36
Guarantee Trust & Banking Co. v. American National Bank, 15 Ga. App. 778 ..... 18, 21
Hancock Life Insurance Co. v. Ross, Receiver, 162 Ga. 654 ..... 17, 32
Harris v. Powers, 129 Ga. 75 ..... 31, 36
In Re Fereri, 188 F. 675 38
In Re Ellis, 296 F. 241 38
In Re Joseph Webre, 219 F. 417 27
In Re Jno. T. Moore Planting Co., 237 F. 737 27
In Re Peerless Weaving & Throwing Co., 259 F. 610 38
In Re Roche, 101 F. 956 38
In Re Torchia, 185 F. 576 38
In Re Wendell, 152 F. 672 38
Murphy v. John Hoffman Co., 211 U. S. 586 27
Labarre v. Citizens Bank, 193 F. 648 39
Peeples v. Strickland, 101 Ga. 829 20
Royal v. Edinburgh-American Land, etc. Co., 143 Ga. 347, 350 20
Security Mortgage Company v. Charles A. Powers, Trustee, 21 (2d) F. 965, Advance Sheets November 8, 1927, No. 10 10
Thompson v. Fairbanks, 196 U. S. 522 17
Valdosta, etc. R. R. v. Citizens Bank, 14 Ga. App. 329 20
York Manufacturing Co. v. Cassell, 201 U. S. 352 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No.

SECURITY MORTGAGE COMPANY,
Petitioner,

vs.

CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY FOR FLORIDA FURNITURE CORPORATION, BANKRUPT,
Respondent.

Petition for Issuance of a Writ of Certiorari.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Security Mortgage Company, a corporation organized under the laws of the State of Georgia, respectfully represents:

1. That on February 24, 1925, it loaned Ninety

Thousand Dollars ($90,000.00) to Hanson Motor Company, a corporation, and took from said company its promissory note for that amount, secured by a loan deed covering land located in Fulton County in the State of Georgia. Said note was payable, as to principal, on February 24, 1930, and bore ten interest coupon notes, for the payment of interest, semi-annually, at 7 per cent, said coupon notes being each for the sum of $3,150. It was provided in said principal note, and in each of the several coupon notes attached, that in case of failure of payment when due all the other notes outstanding, bearing even date and given for the same intent and purpose, should, at the option of the holder, become due and collectible. Said principal note, and each of said coupon notes attached thereto, and the loan deed, contained the agreement of Hanson Motor Company to pay said note when due "with all costs of collection, including ten per cent as attorneys fees, if collected by law or through an attorney at law."

2. By the law of Georgia, in the event of a default of payment, your petitioner had the right, under this contact, after notice, to bring suit against the maker, Hanson Motor Company, and to recover judgment for the amount so contracted to be paid. Under such law, also, the petitioner, under said loan deed, obtained and held a lien on the real estate described therein, to secure the full payment of the amount which at any time should become due under the contract evidenced by said principal note, coupon notes and loan deed.

3. After the giving of said notes, and the making of said loan deed, Hanson Motor Company conveyed said real estate, burdened by the lien created by said

loan deed, to Florida Furniture Corporation, a corporation organized under the law of the State of Florida.

4. Thereafter, on January 7, 1926, said Florida Furniture Corporation was adjudicated a bankrupt, in the United States District Court for the Southern District of Florida.

5. Thereafter, in ancillary proceedings, in the United States District Court for the Northern District of Georgia, on January 11, 1926, a receiver was appointed, and took possession of the real estate covered by said loan deed. The case was referred to Harry Dodd, Referee in Bankruptcy, of Atlanta, Georgia, for ancillary administration of the assets in his jurisdiction.

6. On February 24, 1926, one of the coupon interest notes aforesaid became due and was not paid. Thereafter, on April 1, 1926, your petitioner exercised its option to declare the principal note due and collectible, and gave notice to the Hanson Motor Company of its intention to bring suit on said note and attached coupon in the City Court of Atlanta, Georgia, and to claim, in said suit, the attorneys' fees provided for, as aforesaid.

7. On April 13, 1926, your petitioner, having complied with all requirements of law, did bring suit in said City Court of Atlanta, on said notes, claiming the amount due thereon, principal and interest, and 10 per cent attorneys' fees, as provided therein. Thereafter, on May 4, 1926, judgment was rendered in said court in favor of your petitioner and against said Hanson Motor Company for the principal sum of $93,150, the sum of $1,274, interest to that date, $9,442.40 attorneys' fees, and $15.84, costs of court.

8. In the meantime, on March 12, 1926, Charles A. Powers, who had been elected, and had qualified as trustee of the estate of Florida Furniture Corporation, bankrupt, as aforesaid, in the United States District Court for the Southern District of Florida, applied to the Referee in Bankruptcy, aforesaid, for an order to sell the real estate covered by said loan deed "either free from liens or subject to the lien of Security Mortgage Company."

Your petitioner, on or about that date, was served with an order to show cause why the application should not be granted. It did not seek to show any cause. Before the making of the application of the trustee, however, the Hanson Motor Company, in the United States District Court for the Southern District of Florida, made a motion to vacate the adjudication of bankruptcy, which motion was pending when the application of the trustee, aforesaid, was made. The fact that the application had been made having been called to the attention of that court, an order was made, on April 6, 1926, directing the trustee not to proceed further with the application made by him, as aforesaid, till the further order of that court.

This order remained in force till on or about May 14, 1926, when it was vacated by the court. Thereupon, on May 14, 1926, the Referee aforesaid granted the trustee's application, made as aforesaid, and entered an order directing that on May 28, 1926, the Referee should make sale of the real estate, after advertisement, by public sale "free from all liens, especially from the lien claimed by the Security Mortgage Company, preserving the rights of the Security Mortgage Company to claim the proceeds of said sale in the hands of the trustee," and to report to the court

for confirmation the highest and best and most acceptable bid obtained.

On May 28 the trustee offered the real estate for sale, but no satisfactory bid was received, and no sale was made. On June 2, 1926, the trustee, having renewed application for an order to sell, the Referee made another order directing the trustee, on June 12, 1926, to sell said real estate "free from all liens * * * to the highest and best bidder, subject to confirmation. The rights of all lien creditors preserved in the proceeds."

Under this order the trustee, on June 12, 1926, offered the property for sale free of all liens. The sale was adjourned until June 14, 1926. On that date bids were received for the property from two bidders. The highest and best bid was that of your petitioner, which bid for the property, free of liens, $112,500. Sale was accordingly made to your petitioner, subject to confirmation.

This bid was reported to the Referee, who, on June 15, 1926, made an order confirming the sale, and directing the trustee to make conveyance of the property to your petitioner free of all liens. Said order provided in part as follows:

> "It is agreed in open Court and so ordered that the lien of the petitioner attaches to the proceeds of the sale and that settlement with the trustee may be had by the cancellation of the lawful liens held by the purchaser against said property without the necessity of actually paying the whole amount in cash. It is provided, however, that the amount of said lien is not adjudicated by this order."

9. Your petitioner thereupon presented to the Referee its petition setting forth the amounts of the sev-

eral liens held by it upon said real estate, including its lien under the loan deed aforesaid, declared by judgment, as aforesaid, and prayed that an order be made declaring said several liens to be prior liens upon the real estate in question or upon any funds derived from the sale thereof, and that said liens be allowed as credits against the amount bid by the petitioner for said real estate, as provided in the order of confirmation aforesaid.

The trustee filed objection to the allowance of the lien claimed under the loan deed, so far as the same was represented by the aforesaid item of $9,442.40 attorneys' fees. The Referee, however, allowed the liens claimed, including said item for attorneys' fees, on June 25, 1926.

The trustee thereupon appealed from the order of the Referee to the United States District Court for the Northern District of Georgia. On July 26, 1926, said court sustained the appeal of the trustee, and overruled the order of the Referee, so far as it allowed your petitioner's claim as a lien on said real estate for said $9,442.40 attorneys' fees, and denied your petitioner's claim of lien under said loan deed, except for principal, interest and costs.

Your petitioner thereupon appealed to the United States Circuit Court of Appeals for the Fifth Circuit from said order disallowing said lien for attorneys' fees. On October 25, 1927, said Circuit Court of Appeals denied your petitioner's appeal, and rendered judgment affirming the order appealed from.

10. Your petitioner by said judgment, if the same shall not be corrected, will be deprived of a lien upon said real estate securing its claim for attorneys' fees aforesaid, which lien exists by virtue of the loan deed

aforesaid, made and recorded before Florida Furniture Corporation was adjudicated bankrupt, and before it purchased said real estate burdened by said loan deed. Under the law of Georgia said lien is effective as of the date when the loan deed was made.

11. Your petitioner further says that the opinion of the Circuit Court of Appeals contains the following paragraphs:

> "Appellant relies upon the provision of the Georgia code, par. 6037, permitting transfers of real estate burdened by a mortgage and deed of trust to be disregarded by the mortgage creditor and allowing suit to be brought against the original debtor, and cites *John M. Mitchell Life Insurance Co. vs. Ross, Receiver*, 162 Ga. 654, and *Scott vs. Paisley*, 271 U. S. 632. We conclude that this is beside the issue.
>
> "The attorneys' fees claimed were not a fixed liability at the time of bankruptcy and became a lien on the property, if at all, merely by virtue of the judgment of the State Court. There is no doubt that the property passed into the custody of the District Court sitting in bankruptcy with the adjudication and no other court had jurisdiction to impress it with a lien not then in existence. *Murphy vs. John Hoffman Co.*, 241 U. S. 586; *In Re Joseph Weber*, 219 F. 417; *In Re Jno. T. Moore Planting Co.*, 237 F. 737."

Your petitioner further says that the ruling so made below is in conflict with the applicable local decisions of the Supreme Court of Georgia, and that the ruling that said decisions were not applicable and controlling is untenable.

Your petitioner further says that the Circuit Court of Appeals has misconstrued and misapplied the Fed-

eral Bankruptcy Act in making the decision herein sought to be reviewed.

The questions of local, general, and federal law thus presented in this case are of much importance, and of such character that it is probable that they will frequently arise in other cases. Those questions have never yet been passed upon by this Court. For these reasons, as well as to remedy the wrong done to your petitioner, a writ of certiorari should issue in this case.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals of the Fifth Circuit and to the Clerk of said Court, commanding said Court and said Clerk to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings of said Court in said case, being No. 5012, *Security Mortgage Company vs. Charles A. Powers, Trustee in Bankruptcy for Florida Furniture Corporation, Bankrupt*, to the end that said case may be reviewed and determined by this Court, as provided by law, and that said judgment of said Circuit Court of Appeals may be reversed by this Court, and that your petitioner may have such other and further relief or remedy as may be just.

SECURITY MORTGAGE COMPANY,
By its Attorneys,
ALDINE & HEWITT W. CHAMBERS,
JOHN E. BENTON.

District of Columbia, Washington, ss:

JOHN E. BENTON, being duly sworn says that he is one of counsel for Security Mortgage Company, and

that he has read the foregoing petition, and that the allegations thereof are true, as he verily believes.

JOHN E. BENTON.

Subscribed and sworn to this 23rd day of December, 1927, before me.

CLYDE S. BAILEY,
Notary Public within and for the District of Columbia.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No.

SECURITY MORTGAGE COMPANY

vs.

CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY FOR FLORIDA FURNITURE CORPORATION, BANKRUPT.

Brief in Support of Petition for Issuance of a Writ of Certiorari.

REFERENCE TO OPINIONS BELOW.

The petitioner in this case seeks review of a judgment of the Circuit Court of Appeals, Fifth Circuit, in *Security Mortgage Company v. Charles A. Powers, Trustee*, affirming a judgment of the United States District Court for the Northern District of Georgia. The opinion of the District Court has not been officially reported. The opinion of the Circuit Court of Appeals is reported, 21 (2d) F. 965, Advance Sheets November 8, 1927, No. 10.

STATEMENT OF GROUNDS OF JURISDICTION INVOKED.

The judgment of said Circuit Court of Appeals sought to be reviewed was rendered October 25, 1927. (R. 62) In the Circuit Court of Appeals and in the

District Court the petitioners claimed to be entitled to a lien on real estate located in Fulton County, Georgia, for the amount due to it on a certain promissory note, secured by a loan deed covering said real estate, including attorneys' fees as therein stipulated. (R. 30-37, 47)

The petitioner's lien, including said item of attorneys' fees, had been recognized and allowed by the Referee in Bankruptcy. (R. 37) It was disallowed by the District Court (R. 50), and the judgment of the District Court was affirmed by the Circuit Court of Appeals. (R. 61-62)

The jurisdiction of this court is invoked under the provisions of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The petitioner loaned $90,000 to Hanson Motor Company on February 24, 1925, upon the promissory note of the latter, secured by a loan deed, of the same date, covering real estate in Fulton County, Georgia. The principal note, each with interest coupon note attached, and the loan deed all provided for the payment of ten per cent attorneys' fees if the indebtedness should be collected by law or through an attorney at law. The note also provided that on default in payment of interest, on demand, the entire indebtedness should become due. (R. 31, 32, 35, 46, 48)

Florida Furniture Corporation purchased the equity in said real estate from Hanson Motor Company subject to the petitioner's lien. (R. 48 and 51) That corporation was thereafter adjudicated a voluntary bankrupt, on January 6, 1926, in the District Court for the

Southern District of Florida. (R. 6) On January 11, 1926, in ancillary proceedings in the District Court for the Northern District of Georgia, a receiver was appointed, and he took possession of the real estate in question. (R. 7, 48, 49) On February 24, 1926, a default occurred in payment of interest. On April 13, the petitioner, having given notice, as required by law of its intention so to do, brought suit in the City Court of Atlanta against *Hanson Motor Company* to recover the debt secured by the loan deed, principal and interest, and ten per cent attorneys' fees. On May 4, 1926, it recovered judgment for said debt, and for attorneys' fees amounting to $9,442.40. The judgment was declared a special lien on the real estate in question. (R. 48)

In the meantime, on March 12, 1926, Charles A. Powers, who had been elected and had qualified as trustee of the estate of Florida Furniture Corporation, bankrupt, as aforesaid, in the District Court for the Southern District of Florida, applied to the Referee in Bankruptcy, aforesaid, for an order to sell the real estate covered by said loan deed " either free from liens or subject to the lien of Security Mortgage Company". (R. 10-14)

The petitioner, on or about that date, was served with an order to show cause why the application should not be granted. (R. 15) It did not seek to show any cause. (R. 46) Before the making of the application of the trustee, however, the Hanson Motor Company, in the District Court for the Southern District of Florida, made a motion to vacate the adjudication of bankruptcy, which motion was pending when the application of the trustee, aforesaid, was made. The fact that the application had been made having been called

to the attention of that court, an order was made, on April 6, 1926, directing the trustee not to proceed further with the application made by him, as aforesaid, till the further order of that court. (R. 81)

This order remained in force till on or about May 14, 1926, when it was vacated by the court. Thereupon, on May 14, 1926, the Referee aforesaid granted the trustee's application, made as aforesaid, and entered an order directing that on May 28, 1926, the trustee should make sale of the real estate, after advertisement, by public sale "free from all liens, especially from the lien claimed by the Security Mortgage Company, preserving the rights of the Security Mortgage Company to claim the proceeds of said sale in the hands of the trustee," and should report to the court for confirmation the highest and best and most acceptable bid obtained. (R. 17)

On May 28 the trustee offered the real estate for sale, but no satisfactory bid was received, and no sale was made. (R. 19) On June 2, 1926, the trustees having renewed application for an order to sell, the Referee made another order directing the trustee, on June 12, 1926, to sell said real estate "free from all liens * * * to the highest and best bidder, subject to confirmation. The rights of all lien creditors preserved in the proceeds." (R. 20)

Under this order the trustee, on June 12, 1926, offered the property for sale free from all liens. The sale was adjourned until June 14, 1926. On that date bids were received for the property from two bidders. The highest and best bid was that of the petitioner, which bid for the property, free of liens, $112,500. Sale was accordingly made to your petitioner, subject to confirmation. (R. 21)

This bid was reported to the Referee, who, on June 15, 1926, made an order confirming the sale, and directing the trustee to make conveyance of the property to the petitioner free of all liens. Said order provided in part as follows:

> "It is agreed in open Court and so ordered that the lien of the petitioner attaches to the proceeds of the sale and that settlement with the trustee may be had by the cancellation of the lawful liens held by the purchaser against said property without the necessity of actually paying the whole amount in cash. It is provided, however, that the amount of said lien is not adjudicated by this order." (R. 28)

The petitioner thereupon presented to the Referee its petition setting forth the amounts of the several liens held by it upon said real estate, including its lien under the loan deed aforesaid, represented by the judgment aforesaid, and prayed that an order be made declaring said several liens to be prior liens upon the real estate in question or any funds derived from the sale thereof, and that said liens be allowed as credits against the amount bid by the petitioner for said real estate, as provided in the order of confirmation aforesaid. (R. 30-37)

The trustee filed objection to the allowance of the lien claimed under the loan deed, so far as the same was represented by the aforesaid item of $9,442.40, attorneys' fees. (R. 37-44) The Referee, however, allowed the liens claimed, including said item for attorneys' fees, on June 25, 1926, and ordered the same "paid out of the proceeds from the sale of real estate." (R. 37)

The trustee thereupon appealed from the order of the Referee to the District Court for the Northern District of Georgia. (R. 44)

On July 26, 1926, said court sustained the appeal of the trustee, and overruled the order of the Referee, so far as it allowed the petitioner's claim to a lien for said $9,442.40 attorneys' fees, and denied the petitioner's claim of lien under said loan deed, except for principal, interest and costs. (R. 50)

The petitioner thereupon appealed to the Circuit Court of Appeals, Fifth Circuit, from said order disallowing said lien for attorneys' fees. (R. 52) On October 25, 1927, the Circuit Court of Appeals denied the appeal, and rendered judgment affirming the order appealed from. (R. 61-62)

SPECIFICATION OF ERROR.

The affirmance by the Circuit Court of Appeals of the judgment of the District Court disallowing the petitioner's claim to a lien for said $9,442.40 attorneys' fees constitutes the sole error asserted and intended to be urged in this court.

ARGUMENT.

Summary.

Under the law of Georgia the petitioner's lien, as created by the loan deed to it, was unaffected by subsequent transfer of the equity in the property covered by said deed.

Under the law of Georgia attorneys' fees stipulated for in a note are a part of the principal indebtedness, and a lien securing the debt represented by the note secures also the attorneys' fees.

Section 67d of the Bankruptcy Act preserves the petitioner's lien.

Section 63d of the Bankruptcy Act has no application to the petitioner's claim.

Recognition of the petitioner's claim is in no way inconsistent with either the letter or the spirit of the Bankruptcy Act.

The judgment of the Circuit Court of Appeals is in conflict with applicable local decisions.

The judgment of the Circuit Court of Appeals is in conflict with the decisions of other federal courts.

Under the Law of Georgia the Petitioner's Lien, as Created by the Loan Deed to it, was Unaffected by Subsequent Transfer of the Equity in the Property Covered by Said Deed.

Under the law of Georgia the plaintiff held the *legal title* to the real estate in question as lienor. This lien existed by virtue of the loan deed, and from the date thereof, to wit, February 24, 1925,—a date long prior to the bankruptcy proceedings.

The trustee could take no more than the bankrupt had, which was an equity in the property subject to the lien aforesaid. This court expressed the rule in *York Manufacturing Co. v. Cassell*, 201 U. S. 352, as follows:

> "Under the provisions of the bankrupt act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. * * * The trustee, under such circumstances, stands simply in the shoes of the bankrupt, and, as between them, he has no greater right than the bankrupt. This is held in *Hewitt v.*

Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690. The same view was taken in *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306."

The trustee having sold the property free from liens, under an order of the court preserving the rights of the lienor in the proceeds, the question arises as to the extent of the lien which the trustee must discharge out of the proceeds before any balance of them may be used as estate of the bankrupt. This is a question that must be decided in accordance with the local law of Georgia, which determines the validity and extent of Security Mortgage Company's lien. *Thompson v. Fairbanks*, 196 U. S. 522.

Under the law of Georgia the lien of the grantee under a loan deed is of such character that the receiver of one who has purchased property burdened with a lien, has no right to delay a levy on such property, after judgment has been obtained by the lienor against the maker of the loan deed. This was held in *John Hancock Life Insurance Co. v. Ross, Receiver*, 162 Ga. 654.

The receiver, or a trustee in bankruptcy, simply steps into the shoes of the owner of the equity. He takes the property subject to the liens placed thereon by such owner, or by any predecessor of his in title. When a lien exists to secure the performance of the contract of one who has given a loan deed, or a purchase money note, the rights of the lien holder can be in no way affected by a subsequent conveyance of the equity to a third party, or by the appointment of a receiver.

Upon default in performance of the contract the lienor has a right to proceed against his debtor, com-

plying, as to him, with the requirements of law, and wholly without regard to subsequent holders of the equity. This was held in this Court in a case which came up from Georgia, *Scott v. Paisley*, 271 U. S. 632. It is true even though such subsequent holder be a receiver of the debtor, appointed by a court of competent jurisdiction to take charge of, and administer, the assets for the benefit of creditors. The lien holder is under no obligation to such receiver to give him notice of intention to sue, which the law requires as to the debtor, nor to procure leave from the court which appointed the receiver, nor to name the receiver as a party to his action. The lienor is entitled to obtain judgment against his debtor according to his contract with him, and his judgment, so obtained, measures the extent of his lien. *Guarantee Trust & Banking Co. v. American National Bank*, 15 Ga. App. 778. In this case it was said:

> "The objection is two-fold—(1) that there is no provision of law by which attorneys' fees can be included so as to carry a lien provided by a contract, except for the principal and interest; and (2) that even if the defendant company could have been bound for the attorneys' fees if there had been no receiver there could be no lien in this case for no notice of intention to sue was ever served upon the receivers. It is admitted by the answer that timely written notice of the intention to sue and claim attorneys' fees was served upon the defendant company; and, although it is alleged that no such notice was ever served upon the receivers, we are of the opinion that no further notice than that given was necessary, for the law in reference to giving notice for the collection of attorneys' fees does not extend to receivers of the debtor."

The independent character of the proceeding to obtain judgment upon the contract secured by the lien was pointed out as follows:

> "A receiver is a mere servant of the court acting under orders from the court, and *his* compliance with the terms of a debtor's conditional contract to pay attorneys' fees would perhaps be unenforceable because it would be impossible for a receiver to comply with the terms of the notice and pay the principal and interest of the debt on or before the last return day. * * * There was no difficulty, however, in the way of the directing of a verdict *as against the maker of the notes* in the present case because the maker admitted service of the notice, and *so far as the obligation of the maker of a note whose assets have been placed in the hands of a receiver are concerned, it is not a matter that affects the receiver.*" (Italics ours)

Under the Law of Georgia Attorneys' Fees Stipulated for in a Note Are a Part of the Principal Indebtedness, and a Lien Securing the Debt Repesented by the Note Secures also the Attorneys' Fees.

The lien came into existence when the loan deed was made and it secured, as a whole, whatever amount might become due during the existence of the lien under the contract, performance of which it was given to insure. The amount so secured included the stipulated attorneys' fees. This has been conclusively settled by opinions of the Georgia courts, from which we quote:

> "Under the Civil Code (1910), Sect. 4252, an agreement to pay attorneys' fees, in addition to principal and interest, contained in a promissory note can not be enforced unless the holder of the

note shall give to the debtor notice in writing ten days before bringing suit, and unless the debtor shall fail to pay the debt on or before the return day of the court. If the conditions of this statute are complied with, the attorneys' fees included in the contract are treated rather as parts of the principal debt than as a penalty." *Royal v. Edinburg-American Land etc. Co.*, 143 Ga. 347, 350.

"The notes sued upon were unconditional contracts, so far as they stipulated for the payment of principal and interest, and were conditioned so far as the promise to pay attorneys' fees was concerned, the condition being supplied by the statute, which makes the giving of written notice of the intention to bring suit a condition precedent to the recovery of attorneys' fees. * * * When the conditions required by law for the recovery of attorneys' fees have been met the plaintiff is as much entitled to the recovery of attorneys' fees as he is to the recovery of principal and interest." *Valdosta etc. R. R. v. Citizens Bank*, 14 Ga. App. 329.

"It has been ruled by this court repeatedly, that when a note stipulates to pay a given amount as principal and a certain per cent as attorneys' fees, such attorneys' fee is itself a part of the principal." *Peeples v. Strickland*, 101 Ga. 829; *Evans v. Bank*, 147 Ga. 621.

"It is insisted, however, that even if the plaintiff in this case was entitled, as in *Harris v. Powers*, 129 Ga. 86 (58 S. E. 1038, 12 Ann. Cas. 475), and *McCall v. Herring*, 116 Ga. 239 (42 S. E. 468), to a lien upon the land, these decisions did not hold that the security of the debt extended to the attorneys' fees; and it is urged that no Georgia case can be found in which it is held that attorneys' fees are part of the purchase money. A note given for the purchase money of land may include a stipulation for the payment of attorneys' fees

in the event the principal and interest of the note are not paid at maturity, and in the event of such default if the holder of the note complies with the statutory requirements as to the giving of notice ten days before the filing of the suit and by reason of the nonpayment of the note liability for the attorneys' fees results, *the attorneys' fees become part of the indebtedness and the obligation of the deed given to secure the original debt extends to and includes the attorneys' fees as a part of the debt as a whole. Consequently, one who is entitled to a special lien upon described real estate is also entitled to a lien for the amount of attorneys' fees to which the debtor may be legally subject.* It seems to us that the ruling in *McCall v. Henry, supra*, support this principle just announced. But if we should be in error as to this, and even though we be pioneers in adjudicating this point, we think our holding is supported by sound reasoning, and for that reason the holding is unequivocal." *Guarantee Trust & Banking Co. v. American National Bank*, 15 Ga. App. 778. (Italics ours)

From these opinions it appears to be clear that Section 4252 of the Georgia Code respecting stipulations in notes for payment of attorneys' fees (indirectly alluded to in the Circuit Court of Appeals, and quoted in the footnote*) does not render such stipulations void in the sense that they are null and inoperative, but merely converts them from agreements absolute in form to conditional agreements. Such an agreement

*Georgia Code Sect. 4252. "Obligations to pay attorney's fees upon a note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same; provided, the holder of the obligation sued upon, his agent or attorney, notifies the defendant in writing ten days before suit is brought of his intention to bring suit, and also the term of the court to which suit will be brought."

is existent from the making of the note, and its performance, upon the occurrence of the conditions imported by the statute, if the note be secured, is secured as fully as is the agreement to pay the loaned principal and interest.

Section 67d of the Bankruptcy Act Preserves the Petitioner's Lien.

The petitioner's lien is preserved by Section 67d of the Bankruptcy Act, which provides as follows:

> "d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act."

In the court below it was claimed, on brief, by counsel for the trustee, that a lien for the attorneys' fees in this case cannot be sustained under Section 67d of the Bankruptcy Act, for the reason that the proceedings in the City Court of Atlanta were not taken in good faith, but "to circumvent the bankruptcy act", and that they "thereby were taken in contemplation of bankruptcy."

It is, of course, not necessary to argue that the requirements of the section relate to the placing and taking of the lien, and not to proceedings looking towards the enforcement of it. The entire propriety of the proceedings by Security Mortgage Company will be discussed later in this brief. The point made here is that they could in no event affect the validity of an existing lien.

It was also urged by counsel for the trustee that the consideration for the attorneys' fees claimed was the services of attorneys for Security Mortgage Company, rendered after the adjudication in bankruptcy, and hence that the lien can not be effective as against the trustee. The answer to this contention is obvious. The consideration for the lien was not the attorneys' services, but the $90,000 advanced by Security Mortgage Company, when the loan deed was given. For this payment Security Mortgage Company received the note and the lien securing it. It can not be held that there was any lack of present consideration. No other or further consideration was ever to be paid for the lien.

It is plain enough not to require to be argued that the consideration paid for a lien can not measure the amount secured by the lien at any given time. In this case the lien created by the loan deed secured payment of principal equal to the full amount paid for the lien, and in addition it secured so much interest as might accumulate, at the rate provided by the terms of the contract, and such attorneys' fees as might also become due thereunder. Obviously the amount which might come to be secured was contingent upon the extent to which interest should be permitted to accumulate, as well as upon whether attorneys' fees should accrue. In other words, it would exceed the amount paid for the lien by some uncertain amount.

Section 63d of the Bankruptcy Act has no Application to Petitioner's Claim.

In the Circuit Court of Appeals counsel for the trustee urged, on brief, that the claim of Security Mortgage Company for a lien for attorneys' fees was barred

by Section 63d of the Bankruptcy Act, because the claim was not absolutely owing at the time of the adjudication of bankruptcy. The court said in its opinion:

> "The attorneys' fees were not a fixed liability at the time of bankruptcy, and became a lien on the property, if at all, merely by virtue of the judgment of the state court. There is no doubt that the property passed into the custody of the District Court sitting in bankruptcy without adjudication and no court had jurisdiction to impress it with a lien not then in existence. *Murphy v. John Hoffman Co.*, 211 U. S. 586; *In re Joseph Webre*, 219 F. 417; *In re Jno. T. Moore Planting Co.*, 237 F. 737." (R. 62)

We submit that the contention of counsel referred to, and the ruling of the court below, misconceived the nature of the petitioner's claim. That claim was not presented for allowance generally against the bankrupt's estate under Section 63d; neither is any contention made that the judgment of the state court "impressed" the property in the Receiver's hands "with a lien not then (at the time of the adjudication of bankruptcy) in existence." There is no question here that the petitioner's lien, under its loan deed, was then in existence. The sole question is whether that lien extended to and covered the item of attorneys' fees.

We maintain that the lien does cover the attorneys' fees because, under the law of Georgia settled by the decisions hereinbefore cited, attorneys' fees, when the conditions of the statute as to notice have been complied with, are a part of the principal indebtedness, and are secured to the same extent as the original debt and the interest thereon. The lien was impressed upon the property by the contract of Hanson Motor Company,

and by the loan deed which it gave. It rests to no extent whatever upon the state court judgment.

While that judgment declared the lien, it did not purport to create it, nor to impress it upon the property. It was a mere liquidation of the amount owed to Security Mortgage Company under its contract, secured by the loan deed. Procurance of judgment is, under the law of Georgia, a necessary preliminary step to the enforcement of a mortgage lien in the state courts, but the court rendering the judgment neither creates the lien, nor determines its existence.

This is made clear by the decision of the court in *Edenfeld v. Bank of Millen*, 7 Ga. App. 645 (67 S. E. 896). That was a case where suit was brought in a city court on notes secured by a loan deed. The opinion of the court was in part as follows:

> "The reduction to judgment of a debt secured by a deed, under the provisions of section 5432 of the Civil Code, does not bring up the question of title. If the defendant in *fi. fa.* did not have title at the time he conveyed the property to the creditor, and for that reason the creditor's attempt to put title into him for the purpose of levy and sale was ineffectual, that question would be raised subsequently to the levy. The allegation that the debt was secured by a deed, and the statement that one of the purposes of the suit was to get a special lien, is clearly surplusage, because in any contest over these questions the plaintiff in *fi. fa.* could show *aliunde* that the lien of his judgment was superior to that of others by reason of the fact that his debt had been secured by deed. The city court of Millen had full jurisdiction to reduce to judgment the debt in favor of the plaintiff, and the allegations in favor of the plaintiff, *and the allegations in regard to the nature of the*

> *plaintiff's security, being entirely unnecessary, could be disregarded as surplusage.* Section 5432 of the Civil Code confers a right which, it is plain, from the language employed in Section 1970 of the Code of 1882, is not required to be enforced in the superior court solely. The language used in section 1970 of the Code of 1882 is, 'When any judgment shall be rendered in any of the courts of this state', etc. *A suit to reduce to judgment in any court in this state a debt which is within its jurisdiction, although the debt may be secured by a deed to realty, is not a suit respecting title to land, nor does it affect the title.* Any effect upon a title must develop subsequently to the rendition of the judgment, and is *dependent upon whether there is or is not real estate security.*" (Italics ours)

The state court action was in no sense a proceeding against property in the hands of the bankruptcy court. Because it was recognized that, the property being in that court, the lien must be there asserted against it, Security Mortgage Company made no attempt to levy upon the execution representing the state court judgment, but presented its liens in the bankruptcy court, asking only for an order "declaring petitioner's liens to be prior liens upon the land or any funds derived *from the sale of said lands* in said court." (R. 33) The Referee allowed the claims so presented only *against the fund* and not generally against the bankrupt's estate, in language as follows:

> "This claim is allowed *and ordered paid out of the proceeds from the sale of real estate* and the objections of the trustees are overruled on each and every ground." (R. 37) (Italics ours)

Because the action in the state court was not against the trustee and not against the property of the bankrupt in the hands of the trustee or the Receiver, we submit that the cases cited in the opinion of the Circuit Court of Appeals are not relevant.

In *Murphy v. John Hoffman Co.*, 211 U. S. 586, the question involved was whether title to property in the hands of a trustee in bankruptcy could be settled in a replevin action brought against him personally in the state court.

In re Joseph Webre, 219 F. 417, was a case where a foreclosure suit in a state court was begun after the institution of bankruptcy proceedings, but before adjudication, "the sole purpose of which was *the enforcement of the mortgage lien*, no personal judgment against the mortgage being sought." That clearly was an action against the property; and it was held that the plaintiff in the state court action might be enjoined from proceeding with it, the court saying:

> "The filing of the petition, of course, does not displace or disturb such liens; but neither the existence of such liens nor *attempts of the lienor to enforce them without resorting to the court of bankruptcy for that purpose* constitute obstacles to the exercise by that court of the right to take into custody the bankrupt's estate and to control the administration of it. The court is vested with ample power to protect the rights of lien holders otherwise than by permitting them to be enforced in some other court or courts." (Italics ours)

In Re Jno. T. Moore Planting Co., 237 F. 737, also cited by the Circuit Court of Appeals, a judgment had been obtained in the state court, which directed that the property in question should be seized and sold to

satisfy a mortgage debt. There was a substantial equity above such debt. The property had not been taken possession of by the state court, but was in the hands of the bankruptcy court. The question was whether that court should administer the property, or should surrender it, to be levied upon under the state court process. Holding that it should not be surrendered, the court, on page 742, said:

> "The action pending in the state court between the Levert Company and the Moore Planting Company, at the time the latter filed its petition in bankruptcy, was a personal action, although mortgage rights were invoked. See article 12, La. Code of Prac.; Rogers v. Binyon, 124 La. 95, 49 South. 991; also, Ker v. Evershed, 41 La. Ann. 15, 6 South. 566. Such action could only have a semblance of a real action after an issuance of a writ of *fieri facias and the seizure of the property on which the lien was claimed*, and no writ of *fieri facias* had been issued, and of course no seizure thereunder." (Italics ours)

If a lien has been taken in good faith, for a present consideration, and has been recorded, if record is required by local law, thus conforming to the requirements of Section 67d of the Bankruptcy Act, it is unaffected by bankruptcy, although it may secure performance of a contingent liability not provable in bankruptcy under Section 63d. For example, an agreement to pay a stated sum annually, to a divorced wife so long as she shall remain unmarried, is a contingent liability not provable in bankruptcy. *Dunbar v. Dunbar*, 190 U. S. 340. But it would not be contended that if performance of such a contract has been secured by a mortgage of real estate, a trustee in bankruptcy may

sell the property free from liens, and distribute the proceeds without regard to the lien.

Recognition of the Petitioner's Claim is in no Way Inconsistent with Either the Letter or the Spirit of the Bankruptcy Act.

Recognition of the petitioner's lien violates in no way either the letter or the spirit of the bankruptcy law. It is the policy of that law, expressed in Section 67d, heretofore quoted, to leave wholly unaffected liens which, for a present consideration and in good faith, in a manner recognized by local law parties have taken in their dealings with one who has thereafter become bankrupt.

If liens taken in good faith, and in accordance with the laws under which business is done, in the respective states, were to be destroyed, upon the occurrence of bankruptcy, obviously credit could not exist. Hence Congress expressly disclaimed intent to affect such liens.

In this case Hanson Motor Company desired to borrow money. Security Mortgage Company was willing to lend, but desired to secure repayment of the loan, with interest, and without cost for collection. The law of Georgia enabled the giving of a lien on real estate to secure payment of these several items, subject only to the condition that the lien, so far as attorneys' fees were concerned, should be enforceable only if, after default, Security Mortgage Company (or the holder of the obligation received by it) should give to Hanson Motor Company a notice of its intention to begin suit against it and claim in such suit the fees stipulated for, thereafter beginning and entering such suit according

to such notice. Upon the assurance afforded by such a lien, Security Mortgage Company made the desired loan.

What Security Mortgage Company did when default in payment occurred is not open to proper criticism. It acted not only within its legal rights, but in the only way in which its legal rights could be preserved. It asks now nothing except payment of what was secured to it, when it made its loan, by an agreement of which all the world had notice.

The situation which faced Security Mortgage Company was this: Its debtor had transferred the mortgaged property to Florida Furniture Corporation, which had agreed with the debtor to pay the debt (R. 43),—to which agreement, however, Security Mortgage Company was not a party. Florida Furniture Corporation had become bankrupt. Interest overdue was not paid. The property upon which Security Mortgage Company had a lien to secure payment had been taken possession of by a receiver in bankruptcy. The trustee was asking for authority to sell the property "either free from liens or subject to the lien of Security Mortgage Company." (R. 10, 14) Security Mortgage Company had been served with notice of his petition. (R. 15-16)

In this situation Security Mortgage Company required the services of attorneys to obtain payment. No sane man, in a similar situation, would let his note for $80,000 go unattended, or attempt to act respecting it without legal aid. The contingency which Security Mortgage Company had foreseen as possible, when it made its loan, and had then secured itself against, had arisen. It turned the note over to its attorneys for collection through them.

Against loss from the expense it was thus compelled to incur Security Mortgage Company was entitled to the protection which it had insisted should be given to it. There was, however, a condition of its contract with its debtor, Hanson Motor Company, which rested upon it to perform, in order to keep its security good, and the obligation of such debtor binding, so far as attorney's fees were concerned.

This condition was supplied by the statute of Georgia, hereinbefore set out, which required Security Mortgage Company to give notice of its intent to bring suit, and to claim the stipulated attorneys' fees; and to enter suit according to the notice given,—thus giving to its debtor, under the statute, the time allowed for it to make payment of its debt. *Harris v. Powers*, 129 Ga. 75.

Had Security Mortgage Company failed to perform this condition it would, by such failure, have disabled itself to recover as against its debtor the attorneys' fees stipulated for; and, of course, it could have held the real estate, covered by its loan deed, only to the extent necessary to secure payment of what the debtor owed to it upon the contract secured by that deed.

When, therefore, Security Mortgage Company gave notice to its debtor, and brought suit against it in accordance with the notice, it did only what was requisite to keep good and enforceable the contract its debtor had made. By thus keeping its rights good it neither sought to "circumvent the Bankruptcy Act" nor to take anything from anybody not rightfully belonging to it. Had the property remained in the hands of its debtor nobody could question its rights to attorneys' fees. If the property had passed into the hands of a receiver, or other third party, the same would be true.

John Hancock Life Insurance Co. v. Ross, Receiver, 162 Ga. 654. How, then, can the situation be different where it is the trustee of a bankrupt's estate who has, through the bankrupt, so far as the real estate here in question is concerned, stepped into the shoes of the debtor?

It can not be questioned that Security Mortgage Company, so far as Hanson Motor Company is concerned, had the right to proceed by suit, as it did. This was conceded by counsel for the trustee, in the Circuit Court of Appeals. Undeniably, then, the judgment settles the extent of the indebtedness of Hanson Motor Company to Security Mortgage Company, under the contract secured by the loan deed.

No injustice to the creditors in bankruptcy is involved. Florida Furniture Corporation took the property subject to the lien securing payment of whatever Hanson Motor Company might at any time owe under its contract. Upon bankruptcy this property passed to the bankrupt trustee so burdened.

The trustee knew for what the property was held. He could have prevented default by payment of the interest. And, after default, he could have prevented the maturing of attorneys' fees by payment of the amount due at any time before suit was entered.

There would be no equity in permitting a trustee to neglect meeting obligations which, but for bankruptcy, the bankrupt must have met, by such neglect imposing upon a secured note holder the necessity of employing counsel, without subjecting the trustee to whatever increase in the burden upon the property securing the note naturally arises, under the terms of the instrument of security, from the action made necessary by the trustee's failure to meet those obligations.

The justice of recognizing and giving effect to secured agreements for the payment of attorneys' fees, which a creditor finds it necessary to incur, to protect his investment, was very clearly set forth *In Re Fereri*, 188 F. 675, 676. That case involved a lien similar to the lien in this case, valid under the local law of Louisiana. The mortgaged property had been sold, in the bankruptcy court, free from liens. The referee ruled that the creditor's attorneys' fees for representing the creditor in the bankruptcy court could not be paid from the proceeds of the sale. Overruling the referee, the court said:

> "In the case of *Mullan v. His Creditors*, 39 La. Ann. 397, 2 South. 45, however, which was decided in the instance court by his honor, Mr. Justice Monroe and affirmed by the Supreme Court, the court said:
>
> 'The claim of the mortgage creditor for attorneys' fees incurred by him, after the maturity of the note and for services rendered to secure payment of his note, is well founded.
>
> 'It was agreed by the act of mortgage that the mortgagor bound himself and his assigns to pay the holder of the note all attorneys' fees, as he may incur, in the event of the nonpayment of the notes at maturity.
>
> 'The evidence shows that, after the sale of the mortgaged real estate, the syndic ruled the mortgagee to show cause why the inscription of his act of mortgage should not be cancelled to give a title to the purchaser.
>
> 'The mortgagee was thus constrained to employ counsel to represent him and see that, if the amount went to the syndic, it would be secure in his hands. This was not a mere formality. Responsibility rested on the counsel, for

> which the mortgagee, under the clause, is entitled to recover the compensation, as fixed in the contract.'
>
> "I do not find that this decision has ever been questioned or overruled in the slightest degree, and it applies with the same force to proceedings in bankruptcy as it did to proceedings under the insolvent laws, as no valid title to mortgaged property can be delivered by the trustee without bringing the mortgagee into court in practically the same manner."

This case illustrates the error of the Circuit Court of Appeals in saying that the lien of Security Mortgage Company for attorneys' fees "became a lien on the property, if at all, merely by virtue of the judgment of the state court."

In the *Ferreri* case there was no state court judgment, nor state court suit. Attorneys' fees were held a lien because the contract, secured by the mortgage, stipulated for their payment, and because the state law recognized the mortgage lien as covering such fees.

In this case, Security Mortgage Company's lien for attorneys' fees depends, not upon the state court judgment, but on the agreement to pay contained in the note, and secured by the loan deed.

If appearance had been made for Hanson Motor Company, in the state court suit, and judgment had been thereby delayed, and had not yet been entered, but the facts otherwise were as appears from this record, Security Mortgage Company would have the right to prove its lien for principal and interest and attorneys' fees, as stipulated, against the fund here involved. The condition, as to giving notice, etc., which the Georgia statute imports into the stipulation,

having been performed, the debtor was under obligation to pay according to the stipulation, and the real estate was held to secure performance of the debtor's obligation, without regard to whether a judgment had or not been entered in the suit against the debtor.

The completion of the suit by entry of judgment put into liquidated form Hanson Motor Company's indebtedness; but it neither increased nor diminished any payment which the trustee must make to free the property from the lien of Security Mortgage Company. The declaration, made by the judgment, that the indebtedness found by the court was a special lien was not necessary to its recognition in a court of bankruptcy, *but only the right, under the law of the state, to have it so declared.*

The property under lien having been taken possession of by the bankruptcy court, and sold under an order reserving the right of Security Mortgage Company to have its lien paid from the proceeds, proof of the extent of the indebtedness which the lien secured became necessary. Such indebtedness then having been liquidated by judgment, the judgment was shown, but the declaration of the state court that the lien existed was not depended upon to establish that fact. Proof was offered of the making of the loan deed, of the occurrence of the default, and of compliance with the provisions of the statutes of Georgia with reference to the collection of attorneys' fees in contracts providing therefor. (R. 31, 32)

This lien, recognized by the law of Georgia, Section 67d of the Bankruptcy Act leaves unaffected; and Security Mortgage Company is entitled to payment of the full amount secured by it exactly as if no bankruptcy of a party interested in the property under the

lien had occurred. So far as the bankruptcy proceedings are concerned, the declaration in the judgment that the indebtedness represented by it is a special lien on such property is mere surplusage. The bankruptcy court was not bound by such declaration; but it was bound by the facts and the law, under which the lien existed.

Under the state law, and in the state courts the declaration in the judgment appears to have no greater effect. After judgment has been obtained, when the lien comes to be asserted, its existence is an open question unaffected by the declaration in the judgment. *Edenfeld v. Bank of Milieu*, 7 Ga. App. 645. The trustee has a similar right in the bankruptcy court to deny the existence of the lien, sought to be asserted, notwithstanding the declaration in the judgment, and the question of the existence of the lien is determinable in that court upon the facts shown in the record and under the applicable local law. Hence recognition of the lien claimed to the full extent recognized by such law in no way conflicts with the spirit of the bankruptcy act.

The legality of proceedings intended to keep good a stipulation for attorneys' fees, notwithstanding the insolvency of the debtor, has been settled by the Supreme Court of Georgia. In *Harris v. Powers*, 129 Ga. 75, 58 Southeastern 1038, one holding a note containing such a stipulation, given by one who had died insolvent, gave to the administrator of an insolvent estate notice of intent to sue and claim attorneys' fees, at a specified term of court. He then, on the return day of that term, joined with other creditors in an equitable petition, under which the estate was placed in the hands of a receiver to administer under decree of the court. An auditor was appointed to report on claims

presented in the proceeding. Upon the claim of said note holder, the auditor ruled that it was not equitable to allow attorneys' fees in the circumstances, and that it "was not the purpose of the law makers to have the act of 1900 (Code Section 4252 concerning attorneys' fees) bear such a construction as to impose upon an insolvent estate a large sum for attorneys' fees." The Supreme Court of Georgia held that the attorneys' fees should be paid, saying:

> "The law does not prohibit the rendering of a judgment for attorneys' fees because the debtor estate is insolvent. Such a condition may make it more difficult, and sometimes impossible, for a creditor to realize on his judgment; but he is not debarred from the privilege of obtaining it."

The Judgment of the Circuit Court of Appeals is in Conflict with Applicable Local Decisions.

The decisions which have been hereinbefore cited appear clearly to establish the fact that under the law of Georgia the holder of a secured note, containing stipulation for the payment of attorneys' fees, has the right to the benefit of his security, to insure payment of such fees, notwithstanding conveyance of the property, of which he holds the legal title as such security, to one who becomes insolvent or bankrupt. The decision of the Circuit Court of Appeals in this case conflicts with such applicable local decisions. It is not necessary to argue that the question of local law involved is important, affecting, as it does, contracts which play such a large part in the commercial transactions of the people of every state.

37

The Judgment of the Circuit Court of Appeals is in Conflict with the Decisions of Other Federal Courts.

The ruling below also conflicts with the decisions of other federal courts, where attorneys' fees for services rendered after bankruptcy, but secured by liens valid under local laws, have been recognized. *In Re Wendell*, 152 F. 672 (E. Dist. Pa.); *In Re Torchia*, 185 F. 576 (W. Dist. Pa.); *In Re Peerless Weaving & Throwing Co.*, 259 F. 610 (M. Dist. Pa.); *In Re Ferro*, 188 F. 675, (E. Dist. La.); *In Re Ellis*, 296 F. 241 (W. Dist. Pa.)

In its opinion the Circuit Court of Appeals cited three decisions of its own as a precedent for the decision made in this case. It might well be expected that other decisions involving the same error would be found in the Fifth Circuit, but the particular cases cited by the court appear to be dissimilar to this case. We mention them briefly.

In Re Roche, 101 F. 956, is the first of those cases. There the note provided for payment of attorneys' fees "should it become necessary to foreclose" before foreclosure bankruptcy occurred, and the trustee sold the property. The mortgagee presented his claim for debt and attorneys' fees, asserting that the proceeding in the bankruptcy court was the equivalent of foreclosure. The claim, as to attorney's fees, was denied, upon the ground that it was not the intent of the statute that bankruptcy proceedings should be considered the equivalent of foreclosure. It was clearly recognized that the bankruptcy court should hold valid the security to the full extent created by the contract. We quote from the opinion:

"The contract being valid according to the laws of Texas, it only remains for us to decide how it shall be construed. * * * In construing the contract, the intention of the parties must prevail, and this intention should be derived from the language employed. The contract must stand as the parties made it. A new contract cannot be made for them by the court. * * *

"The fees, to become a charge against the debtor or his property, must mature according to the contract of the parties. It follows that if the attorney's fees in this case became payable only upon the foreclosure of the trust deed by suit in the usual form, as by bill in equity, or, according to the practice in Texas, by petition praying for a foreclosure, with all parties claiming adversely before the court, they would not be collectible in a proceeding where the trustee in bankruptcy had sold the property and distributed the proceeds, although the same end might have been attained in securing the payment of the debt of the mortgagee."

The next case cited was *Labarre v. Citizens Bank*, 193 F. 648. In that case fees were disallowed, not because the stipulation for fees was unenforceable, but because, under the stipulation, they had not become due. The decision went expressly on that ground, the court saying:

"Labarre, the plaintiff in error, was an endorser of the note, and was not a party to the mortgage. The right to collect attorneys' fees does not appear to exist inasmuch as the foreclosure of the mortgage 'for want of payment' has not yet been resorted to."

In *British & American Mortgage Company v. Stuart*, 210 F. 425, the last of said three cases, the claim, as the

court held upon consideration of the pleadings, was presented not against the fund resulting from sale of the mortgaged property alone, but for allowance to be paid from the estate, on a parity with unsecured claims, to the extent that the security might be insufficient. For this reason it was held that Section 63a prevented the allowance of attorneys' fees for services after bankruptcy.

Certain other federal court decisions were also cited below, on brief, by counsel for the trustee, as supporting their contention that the petitioner's lien for attorneys' fees should not be recognized. We do not deem it necessary to discuss those cases. Some of them involved claims for attorneys' fees on unsecured notes. Some of them arose from states where the local law is different from the law of Georgia; and some were not analogous to this case. If it be conceded that some cases from District Courts in the Fifth Circuit, and possibly some other of the cited cases, appear not in conflict with the decision which has been made below in this case, this diversity of rulings but emphasizes the necessity for the issuance of the writ sought in this case, to the end that the correct rule may be declared by this court.

Respectfully submitted,

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JAN 14 1928
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1927.

NO. [redacted] 32

SECURITY MORTGAGE COMPANY,
Petitioner.

versus

CHARLES A POWERS, Trustee in Bankruptcy for FLORIDA FURNITURE CORPORATION, Bankrupt,
Respondent.

DILLON, CALHOUN & DILLON,
Attorneys for Respondent.
WALTER S. DILLON, of Counsel.
Atlanta, Georgia.

IN THE

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NO.....

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versus

CHARLES A POWERS, Trustee in Bankruptcy for FLORIDA FURNITURE CORPORATION, Bankrupt,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO ISSUANCE OF THE WRIT OF CERTIORARI.

It will be noted that the petition for certiorari is based upon the contention that the decision complained of is in conflict with decisions of the Supreme Court of the State of Georgia, upon the same question, and that the Circuit Court of Appeals, in rendering the decision, was in error in deciding that the State court decisions were not applicable.

This court should, therefore, at the outset, determine the nature of the issues involved. We think that counsel have misconceived the case, in that the validity of the judgment of the City Court of Atlanta fixing the lien for attorneys,

when asserted in the bankruptcy court, depends upon bankruptcy law and not on the decisions of the Supreme Court of Georgia.

There are two (2) issues, both of which are based upon federal law, and to decide these there is no occasion to consider the state law.

These two questions, or issues, are as follows:

1. Did the City Court of Atlanta have jurisdiction to fix a lien against real estate then in the custody of the trustee in bankruptcy? (It must be conceded, that without this judgment, there can be no basis for the lien claimed.)

2. Was the debt for attorneys' fees due and absolutely owing at the time of bankruptcy, as required by Section 63A of the Bankruptcy Act?

It will be readily seen that both of these questions will be solved by reference to federal law and not to state law.

THE BANKRUPTCY COURT HAD EXCLUSIVE JURISDICTION.

The actual possession by the bankruptcy court of the property involved effectually displaced the power of other courts to deal with it.

Murphy v. John Hoffman Company, 211 U. S. 586; 53 L. Ed. 330; 29 Sup. Ct. 154; 21 A. B. R. 487.

In re: O. L. Stamps, 300 Fed. 162, 3 A. B. R. (N. S.) 583.

Matthews & Sons v. Webre Co., 213 F. 396.

In Re: Buxton, 236 F. 407.

In Re: Joseph Webre, Pugh, v. Loisel, 219 F. 417.

Re: Hotel Equipment Company, 297 F. 842; 3 A. B. R. (N. S.) 21.

Palmer v. Texas, 212 U. S. 131, 53 L. Ed. 440.

In Re Schermerhorn, 145 F. 341.

Jurisdiction of Bankruptcy Court is essentially exclusive.

Re: Watts, 190 U. S. 30; 47 L. Ed. 933.

Central National Bank v. Stevens, 169 U. S. 459; 42 L. Ed. 817.

Annotation, Note 8, United States Code Annotated, Title 11, pp. 53-55, same pp. 74-76.

Collier on Bankruptcy, Volume 1, page 43.

5 Remington on Bankruptcy, pages 430, 444, 445, 449.

Wabash Railroad v. Adelbert College, 208 U. S. 54-8, 52 L. Ed. 386.

Central Bank of Ga. v. Gibson, 11 Ga. 453.

Ponce v. Underwood, 55 Ga. 602 (2).

Guarantee Trust, etc., v. Green Code Springs, etc., 139 U. S. 137 (5); 35 L. Ed. 116 (5).

15 C. J. 853.

In Re: Gimbel, 294 Fed. 883 (1).

THE DEBT FOR WHICH LIEN IS CLAIMED MUST BE ABSOLUTELY OWING AT THE TIME OF BANKRUPTCY, SECTION 63A, BANKRUPTCY ACT.

British & American Mortgage Co. v. Stuart, 210 Fed. 425; 5th Cir. C. C. A.

First Savings Bank & Trust Co. v. Stuppi, 2 Fed. (2nd) 822 (4).

McCabe v. Patton, 174 Fed. 217.

Hoffecker v. Smith, 294 Fed. 883 (3) 5th Cir.

Zavelo v. Reeves, 227 U. S. 628; 57 L. Ed. 678-9.

In Re: Garlington, 115 F. 999—D. C. Tex.

In Re: Thompson, 144 F. 314, D. C. Tex.

In Re: Keeton, etc., 126 F. 426-429, D. C. Tex.

In Re: Muscott Steel Products Co., 294 Fed.84.

In Re: Gebbard, 140 F. 571, D. C. Pa.

Remington, Sections 809 and 2613.

2 Collier, page 1394.

In Re: Mobile Chair Mfg. Co., 245 Fed. 213.

It will be noted that while the petition for certiorari in this case is based on conflict alleged to exist between the decision sought to be reviewed and the state court decisions, yet in petitioner's brief it is contended that there is a conflict also with other federal court decisions. We submit that the decision of the Circuit Court of Appeals, and the cases cited in this brief, are not in conflict with other decisions cited by petitioner, and that the decision of the Circuit Court of Appeals is in harmony with decisions generally by other courts on the same question, and that there is no occasion to require this court to render a decision in order to settle a conflict. This court has already passed on both questions. The state of the law is most harmonious and satisfactory,—not to be improved upon by additional judicial findings.

The specific decisions mentioned by counsel in their brief, as being in conflict with the decisions relied upon by respondent, are given on page No. 38 of brief of petitioner.

The court will observe that these are all opinions of district courts in the State of Pennsylvania, except one in Louisiana. We have examined these and find that while attorneys' fees were allowed, the opinions were not based upon the jurisdiction of another court to fix the fees, nor on the fact that the debt was not due and owing, so that there is no ruling in these decisions in conflict with the decisions cited. And, we think that no court could very easily render a decision finding that attorneys' fees earned after bankruptcy was a debt absolutely due and owing at the time of bankruptcy, nor is there a decision to be found which would permit a state court to oust the jurisdiction of the bankruptcy court, once the administration had taken place and the property involved had come under its jurisdiction.

Respectfully submitted,

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Supreme Court of the United States

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Petitioner,

vs.

[redacted]
Respondent.

[redacted]

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INDEX

	PAGE
Statement	1
Argument	3
Rights Under Contracts are Fixed as of the date of Bankruptcy	3
Jurisdiction in Personam	7
Jurisdiction in Rem	5
Bankruptcy Court Had Exclusive Jurisdiction	9
Section 63a-1 Bankruptcy Act	10
Section 47a Bankruptcy Act	11
Attorney's Fees Were Not Earned	12
Claims Arising After Bankruptcy	13
Lien Asserted in Violation of Section 67d of the Bankruptcy Act	13
Scott v. Paisley	14
In Conclusion	14

CASES CITED

Acme Harvester Co., v. Beekman Lumber Co., 222 U. S. 305	7
Bailey v. Baker Ice Mach. Co., 239 U. S. 275	4
British & American Mortgage Co. v. Stuart, 210 Fed. 425; 5th Cir. C. C. A.	11
Central National Bank v. Stevens, 169 U. S. 459; 42 L. Ed. 817	10
1 Collier on Bankruptcy, 13th Ed. p. 658	3
2 Collier, page 1394	11
Davenport v. Richards, 138 Ga. 611-612	8
Ex parte Chetwood, 165 S. 460	8
First Savings Bank & Trust Co. v. Stuppi, 2 Fed. (2nd) 822 (4)	11
Georgia Civil Code, Section 5945-46	11
Georgia Statute Civil Code 4252	11
Hoffecker v. Smith, 294 Fed. 883 (3) 5th Cir.	11
Hines & Hobbs v. Rawson, 40 Ga. 360	8
In Re: Buxton 236 F. 407	9
In Re: Gebbard, 140 F. 571, D. C. Pa.	11

In Re: Harris, 272 Fed. 350 (4) 13
In Re: Hotel Equipment Co., 229 F. 842, 3 A. B. R. (N. S.) 21 9
In Re: Garlington, 115 F. 999—D. C. Tex. 11
In Re: Keeton, etc., 126 F. 426-429, D. C. Tex. 11
In Re: Ledbetter, 267 Fed. 893—D. C. Ga. 13
In Re: Mobile Chair Mfg. Co., 245 F. 213 14
In Re: Muscott Steel Products Co., 294 Fed. 84 11
In Re: Schermerhorn, 145 F. 341 9
In Re: Thompson, 144 F. 314, D. C. Tex. 11
In Re: Vandiver, 210 Fed. 425—5th Cir. 13
In Re: Weiland, 197 Fed. 116 (Ga.) 13
In Re: Joseph Webre, Pugh v. Loisel, 219 F. 417 9
Lazarus, Michel & Lazarus v. Prentice, 234 U. S. 265 5
McCabe v. Patton, 174 Fed. 217 11
Matthews & Sons v. Webre Co., 213 F. 396 9
Murphy v. John Hoffman Co., 211 U. S. 586; 53 L. Ed. 330; 29 Sup. Ct. 154, 21 A. B. R. 487 9
Palmer v. Texas, 212 U. S. 131, 53 L. Ed. 440 9
Robertson v. Howard, 229 U. S. 258 6
Remington, Section 809 and 2613 11
Stamps, 300 Fed. 162, 3 A. B. R. (N. S.) 583 9
Stone v. Marshall & Co., 137 Ga. 544 3
Turner v. Peacock, 153 Ga. 879 (5) 8
Wabash Railroad v. Adelbert College, 208 U. S. 54—8, 52 L. Ed. 385 10
Watts, 190 U. S. 30; 47 L. Ed. 933 10
Whitney v. Wenman, 198 U. S. 552 5
Zavelo v. Reeves, 227 U. S. 628; 57 L. Ed. 678-9 (4) 11

IN THE

SUPREME COURT OF THE UNITED STATES

Term No. 662, October Term, 1927.

SECURITY MORTGAGE COMPANY, PETITIONER,

vs.

CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY FOR FLORIDA FURNITURE CORPORATION, BANKRUPT, RESPONDENT.

STATEMENT

The Security Mortgage Company, petitioner herein, holds a note providing for payment of principal, interest, and attorney's fees. The note was secured by a deed to property which came into custody of the bankruptcy court. Hanson Motor Company, maker of the note, had transferred the property to the bankrupt which assumed the indebtedness.

At the time of bankruptcy, the note was not in default. A trustee had been elected who was in actual custody of the property and was preparing to sell this real estate before the interest installment became due.

In the proceedings brought by the trustee to sell, he made the Security Mortgage Company a party by rule, and it appeared in the bankruptcy court in response to the proceedings to sell, and made no objection to this action of the trustee, later having filed a petition to confirm the sale. The trustee had recognized the validity of the security deed to the extent of principal, interest and taxes, and the purpose of the trustee was to make the property bring some amount over and above these liens, to be used for the benefit of unsecured creditors.

At this time the attorney's fees provided in the note, under the statute of Georgia, was not due, such provision as to at-

torney's fees being void, unless and until notice had been given and suit instituted in pursuance thereto, and such attorney's fees could not be claimed directly in the bankruptcy proceedings.

After the bankruptcy court had thus taken jurisdiction of the res involved, had proceed to an orderly administration by making the Security Mortgage Company a party, and recognizing the invalidity of the provision for attorney's fees under its contract, the Security Mortgage Company sued the maker of the note, Hanson Motor Company, in a state court, complying with the statute as to notice to the maker, and secured a judgment for principal, interest and attorney's fees, against the Hanson Motor Company, who had executed the loan deed.

The Security Mortgage Company went into the state court for this purpose at a time when the trustee was doing all possible in a legal way to have the property sold and the debt paid, so that there was no necessity for such legal action, and it did not improve the lien rights of the Security Mortgage Company as against the property, nor tend to hasten the collection of principal and interest, and no attempt was made to disturb the custody of the trustee, no notice having been given of the state court proceedings.

The question then before this court of determination is whether attorney's fees provided in a note which have been matured by judgment in the state court, after bankruptcy, can be asserted against the property in the actual custody of the trustee under all the facts and circumstances as set forth above.

The case was tried in the courts below soley on the theory that the judgment of the City Court of Atlanta adjudicated the right to attorney's fees, and thereby a right not had directly in the banqruptcy court on the note itself was created, upon which the claim was predicated in the bankruptcy court, and when the claim to the fund was finally made it was under the judgment (R pp 24 and 26).

ARGUMENT

We assume that the position of counsel for the Security Mortgage Company is that to disallow the claim for attorney's fees would in effect deprive claimant of its rights under the contract, for counsel say in their brief (page 25) "It (the lien) rests to no extent whatever upon the state court judgment." So that whatever right is claimed, must proceed from the contract and not from the judgment, although it will be conceded that no claim could have been set up on the contract without the aid of the judgment in the bankruptcy court, and, in fact, no such claim was made. See Stone vs. Marshall and Company 137 Ga. 544.

We do not believe the case can be now tried, on any such theory, it being too late to shift, and that the question must be decided on the validity of the judgment in the state court.

And counsel's position that the debt for attorney's fees existed on the date when the note was made is erroneous, since it is a fact that attorney's fees could not exist under the contract till notice had been given followed by judgment.

The contentions of the trustee are as follows:

RIGHTS UNDER CONTRACTS ARE FIXED AS OF THE DATE OF BANKRUPTCY.

The trustee says that he represents all the creditors of the estate of the bankrupt, secured and unsecured, and that the rights of all parties must necessarily be fixed as of some specific date, and that the date of adjudication and custody of the res, is this date. Whatever conditions exist as of that date, determine the rights of creditors. "As has been stated, the condition at the time of filing of the petition measures the extent of the estate, and the rights of all creditors of the bankrupt and all parties interested in the property throughout all the provisions of the law." 1 Collier on Bankruptcy, 13th Ed., p. 658. Bankruptcy "stays the hands of creditors." After bankruptcy, claims cannot be increased or rights changed

except by proceedings in the bankruptcy court. That court has exclusive jurisdiction and will look to see what claims existed on the date of bankruptcy.

But it will be contended that the enforcement of this rule, will deprive the Security Mortgage Company of its contractural rights. To this we say, that its right, namely, to have its debt paid, principal and interest, were being looked after by the bankruptcy court when the judgment increasing the debt was taken. And that the bankruptcy law existed when the Security Mortgage Company entered into its contract. The bankruptcy law is a paramount law, a law which, when jurisdiction ensues, displaces all other power to deal with the estate, and the Security Mortgage Company had notice of this law when it entered into its contract, so that his claimant can have now no complaint, if its contract is recognized as it existed on the date of bankruptcy.

The bankruptcy rule is analagous to the equity rule that prevails in Georgia, where notes are presented for payment in an equity case. Stone vs. Marshall supra.

It would be impossible to properly conduct the administration of an estate, and do justice between all creditors, the secured and unsecured, without having a date when the rights of creditors become fixed.

If such be the bankruptcy law, then a secured creditor ought not to be permitted to do indirectly what it could not do directly. If the Security Mortgage Company had no claim for attorney's fees under its contract as of the date of bankruptcy, and after it had become a party to the proceedings, then it ought not to thereafter be allowed to create a claim by indirect proceedings. This would do violence to the principle expressed in a number of cases decided by this court. On the point discussed, we quote the following:

Bailey vs. Baker Ice Mach. Co., 239 U. S. 275.

"When not otherwise specially provided, the

rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed, and that his estate passes actually or potentially into the control of the bankruptcy court."

Lazarus, Michel & Lazarus vs. Prentice, 234 U. S. 265. "The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts, wherever situated, into custodia legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the fulll right to administer the estate under the bankruptcy law."

"Such assignment was a mere nullity, properly disregarded by the bankruptcy court, and notwithstanding which it could direct the delivery of the bankrupts' property to the receiver by summary order. Whatever rights they had are asserted to arise by virtue of the assignments made April 1st, 1913, and after the filing of the original petition in bankruptcy."

Whitney vs. Wenman, 198 U. S. 552.

JURISDICTION IN REM.

The Security Mortgage Company possibly seeks to improve its position by saying that the action in the state court was merely under its contract and against the Hanson Motor Company, who was not a party to the bankruptcy proceeding, and, that the authority of the bankruptcy court to adjudicate its right to attorney's fees, did not exist because it could not act *in personam* as against Hanson Motor Company. This posi-

tion is not tenable, for the reason that the bankruptcy court acts in rem; persons are not so much involved as property. The whole proceeding revolves around an estate, property, assets, the res. It is this rem jurisdiction that is effective in this case as regards rights held against the Hanson Motor Company over whom the bankruptcy court did not have jurisdiction *in personam*. In this case, the res came into custody of a trustee, before the state court acted. So that superior jurisdiction was acquired, even though the Hanson Motor Company, the maker of the note, was not a party to the bankruptcy proceeding. Regardless of individuals, the bankruptcy proceedings are so far in rem that the estate is withdrawn from all outside influences, and the bankruptcy court takes upon itself the exclusive jurisdiction and right to adjudicate all questions respecting the estate as such rights existed on the date of bankruptcy.

The fact that under its contract the Security Mortgage Company had a right to sue its claim to a judgment, including attorney's fees, as against the Hanson Motor Company, is of no avail as against the res in the hands of the bankruptcy court. For bankruptcy acts in rem as well as personam. If it acted only in personam, then the situation would be different, for the judgment as against the Hanson Motor Company was good and in conformity with its contract. When the res passed out of the Hanson Motor Company and into the Florida Furniture Company, and bankruptcy followed before suit in the state court, rights became fixed under the bankruptcy law, which prevented the state court judgment for attorney's fees becoming effective as against the property in the hands of the trustee.

On this question of jurisdiction being in rem, this court, in Robertson v. Howard, 229 U. S. 258, decided the lower court was wrong in assuming the jurisdiction of the bankruptcy court was *in personam*. We quote:

"The court while conceding that the adjudication in bankruptcy 'conveyed this land and all the property of Hagener to the trustee', yet decided that 'the court had no jurisdiction over the land. Its jurisdiction was in personam'."

Lazarus v. Prentice, 234 U. S. 263 supra.

Acme Harvester Company v. Beekman Lumber Co., 222 U. S. 305. "It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition."

In addition to the jurisdiction existing in rem, the bankruptcy court had by the service of the rule, jurisdiction in personam of the Security Mortgage Company, the only person whose rights were affected, and this was sufficient to make void the action in the state court.

JURISDICTION IN PERSONAM

The service of the rule on the Security Mortgage Company and its appearance in court pursuant thereto, gave the bankruptcy court jurisdiction over the parties at interest. A forum was thereupon established for the determination of all the rights possessed by the Security Mortgage Company under its contract, and it was not necessary to make the Hanson Motor Company a party.

When jurisdiction attached, whether in personam or in rem, it excluded the right of the state court to act.

Hines & Hobbs v. Rawson, 40 Ga. 360. "Now, in all such cases, as well by repeated decisions as by the necessities of the case, the Court first acquiring the jurisdiction in fact has it to the exclusion of the other: 9 Wheat., 532; 20 How., 583; 10 How., 56; 14 How., 368; 23 How., 90. Interminable confusion would result from any other rule, while harmony and justice flow naturally from the rule as established."

Ex parte Chetwood, 165 U. S. 460. "The doctrine is firmly established that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached that right cannot be arrested or taken away by proceedings in another court, and that where property is actually in the possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court of concurrent jurisdiction. Moran v. Sturges, 154 U. S. 256 (38:981), and cases cited. And by U. S. Rev. Stat. 720, the granting of injunctions to stay proceedings in any court of a state is prohibited in express terms."

We ask this court to apply this law to the situation which existed in the bankruptcy court when Security Mortgage Company went into the state court without notice to the bankruptcy court.

Suppose a state court of equity in Georgia had secured jurisdiction in the same way over the parties as the bankruptcy court had, what would have been the results? The following Georgia cases will answer:

Turner v. Peacock, 153 Ga. 879 (5).

Davenport v. Richards, 138 Ga. 611-612.

The Turner vs. Peacock case indicates, that where a state court of equity had taken jurisdiction of the parties with respect to a contract in which attorney's fees are provided to be paid, and before a statutory notice claiming such fees had been given, it would then be too late to comply with the statute in order to mature the claim for attorney's fees, and the party

who held such contract would not be permitted to be excused long enough in which to go out to another court, perfect his attorney's fees and then return and assert the claim in the district court.

BANKRUPTCY COURT HAD EXCLUSIVE JURISDICTION.

Not only was there jurisdiction by virtue of the custody of the res, but this jurisdiction is exclusive.

The opinion in Murphy vs. John Hoffman Company, 211 U. S. 586; 53 L. Ed. 330; 29 Sup. Ct. 154, H. A. B. R. 487, decisive: "It is immaterial that instead of seeking to prove a secured claim in the bankruptcy court, the lienor sought to proceed in the state court. The actual possession by the bankruptcy court of the property involved effectually displaces the power of all other courts to deal with it."

In dealing with the allowance of attorney's fees in a case similar to the one at bar, the Hoffman decision is cited by Sibley, D. J. (Ga): In matter of Stamps, 300 Fed. 162, 3 A. B. R. (N. S.) 583, where he says: "No other court, so long as the bankruptcy court retained its custody and control of the property, had jurisdiction or authority to deal with it or enforce any lien against it, without the express authority of the bankruptcy court."

Other authorities bearing directly on this question are the following:

Matthews & Sons vs. Webre Co., 213 F. 396.

In Re: Buxton 236 F. 407.

In Re: Joseph Webre, Pugh vs. Loisel, 219 F. 417.

In Re: Hotel Equipment Company, 297 F. 842; 3 A. B. R. (N. S.) 21.

Palmer vs. Texas, 212 U. S. 131, 53 L. Ed. 440.

In Re: Schermerhorn, 145 F. 341.

Jurisdiction of bankruptcy court is essentially exclusive—and most comprehensive: Re: Watts, 190 U. S. 30; 47 L. Ed. 933.

Central National Bank vs. Stevens, 169 U. S. 459; 42 L. Ed. 817.

> Wabash Railroad vs. Adelbert College, 208 U. S. 54—8, 52 L. Ed. 386. "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts."

SECTION 63a1 BANKRUPTCY ACT.

Akin to the established rule that the rights of all creditors must be considered as such rights existed at the date of bankruptcy, is the positive and mandatory provision of the bankruptcy act as expressed in Section 63a. It is in the bankruptcy court that the claim herein for attorney's fees is asserted, and it is concededly a claim which did not exist on the date of bankruptcy. If it be conceded that the state court had the right to enter a judgment establishing a claim against the estate then in the hands of the trustee, yet, since this claim for attorney's fees was not a fixed liability, absolutely owing at the time of filing the petition, it would not be such a debt as can now be recognized.

Counsel's position, while not clearly stated, seems to be that the claim for attorney's fees should be considered to exist as of the date of the loan deed. But we have found no authority that accepts any such theory, and we cannot conceive of a theory so obviously at variance with the plain fact that it exists, if at all, only from the date of judgment in the state court.

Moreover it is a fact that the claim at the date of bankruptcy was contingent. It is well settled that claims that are

contingent at the time of bankruptcy cannot be paid. The following are authorities:

British & American Mortgage Co. v. Stuart, 210 Fed. 425; 5th Cir. C. C. A.

First Savings Bank & Trust Co. v. Stuppi, 2 Fed. (2nd) 822 (4).

McCabe v. Patton, 174 Fed. 217.

Hoffecker v. Smith, 294 Fed. 883 (3) 5th Cir.

Zavelo v. Reeves, 227 U. S. 628; 57 L. Ed. 678-9 (4).

In Re: Garlington, 115 F. 999—D. C. Tex.

In Re: Thompson, 144 F. 314, D. C. Tex.

In Re: Keeton, etc., 126 F. 426-429, D. C. Tex.

In Re: Muscott Steel Products Co., 294 Fed. 84.

In Re: Gebhard, 140 F. 571, D. C. Pa.

Remington, Section 809 and 2613.

2 Collier, page 1394.

In this connection it is proper to consider that attorney's fees which are contingent and which mature after bankruptcy are analagous to executory contracts, liability on which arise after bankruptcy, in instances such as rents under a lease, salary to be paid, or other cases arising under executory contracts. Under the bankruptcy law, such contractural rights are in effect abrogated by bankruptcy, and claims arising thereunder are not allowed. But it is not considered in such cases that bankruptcy fails to give effect to contractual rights in existence at the time of bankruptcy.

SECTION 47a, BANKRUPTCY ACT.

This section is in harmony with the general scheme of bankruptcy administration. The fact that the trustee is deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, de-

stroys the effect of an after acquired lien. While it is contended that the claim for attorney's fees takes its date from the loan deed and not from the judgment, yet this cannot be, because by Georgia Statute, Civil Code Section 4252, the claim for attorney's fees was void at the time of bankruptcy and will be noted that the statute is found in the code under the subject of Illegal Contracts. It was contingent upon being sued and collected by law, and so under bankruptcy the claim for attorneys being asserted herein on a judgment, the lien of which post-dated the lien of the trustee, could not take priority over the trustee's rights to the fund.

ATTORNEY'S FEES WERE NOT EARNED.

The contract to pay attorney's fees and the Georgia Statute referred to contemplates that the maker shall be liable to pay in addition to principal and interest, ten per cent if collected by law or through an attorney at law, (R25) after notice given in compliance with the statute.

The effect and intention of this contract is that the collection must be enforced by law. The state court action was not for the purpose of collection; the collection was made in the bankruptcy court. No attempt was made to collect on the fi fa except in the bankruptcy court, and none could have been made elsewhere as against the bankrupt.

In this case, the court will observe from the record, that the Security Mortgage Company had been made a party to a proceeding brought by the trustee, wherein a sale was about to be consummated, which sale later produced an amount in excess of all the principal and interest, and the Security Mortgage Company went into another court and filed suit, in which proceeding the attorney's fees claimed arose. This action violated the spirit and intent of the agreement, and created an additional indebtedness not contemplated or necessary, and the creditor should not be permitted to make a profit by collecting fees if he did not have to pay.

British American Mortgage Co., v. Stuart, 210 Fed. 427.

In Re: Harris 272 Feo. 351 (4).

CLAIMS ARISING AFTER BANKRUPTCY.

It is inconsistent with the Bankruptcy Act to recognize and pay a claim which arose after bankruptcy, regardless of Section 63a of the Bankruptcy Act.

See in this connection the following:

In Re: Vandiver, 210 Fed. 425—5th Cir. In this case the court said: (page 430): "We find no provision permitting the proof of a secured or unsecured claim which accrued after bankruptcy."

In Re: Weiland, 197 Fed. 116 (Ga.)

In Re: Ledbetter, 267 Fed. 893—D. C. Ga., "But if, after filing the petition in bankruptcy, the creditor elects to pursue to judgment his remedy in the State Court, instead of relying on that afforded by the bankruptcy court, costs subsequently arising are not provable and will not be allowed."

LIEN ASSERTED IN VIOLATION OF SECTION 67d OF THE BANKRPTCY ACT.

Collier on Bankruptcy in discussing Section Sixty-seven of the Act says: "Its various paragraphs and salient features make the section consistent and far reaching in the extreme." p. 1506. "'Good faith,' and 'not in contemplation of or in fraud upon the bankruptcy act,' are of the essence of this subsection without which the liens therein mentioned cannot be upheld even though there be a present consideration for them."

In this case, the very purpose of going to the state court for a lien for attorney's fees was to create a legal reason on which to base the additional claim when thereafter asserted in the Bankruptcy Court. The Security Mortgage Company knew that by asserting its claim simply on the notes and loan deed no attorney's fees could be collected. The plan was to

secure a judgment lien for the fees, and then file this as a lien against the property already in the hands of the trustee. The proceedings thereby were taken in contemplation of the bankruptcy, and in order to circumvent the bankruptcy, after obtaining jurisdiction in personam over the Security Mortgage Company, which we think violates section 67d and does violence to the spirit and intention of the entire Act.

In Re: Mobile Chair Mfg. Co., 245 F. 213.

SCOTT V. PAISLEY.

The Scott v. Paisley case, cited by counsel in their brief, does not contain the element which controls the case at bar. That case involved a constitutional question as to whether there had been due process of law as against the transferee of the equity in the land, who was not notified in a foreclosure of a loan deed brought only against the original maker of the note and loan deed. There was no bankruptcy law involved, and no exclusive jurisdictional question. It is true in this case, as in that, that the judgment against the Hanson Motor Company, the original maker, is good, but such judgment cannot bind or affect the land then under the exclusive jurisdiction of the bankruptcy court. So, we conclude, that the law as expounded in Scott v. Paisley, does not bear on the question now to be decided.

IN CONCLUSION

It is apparent that if the decisions of the District and Circuit Court of Appeals are reversed by this court, that it must be based on an entirely new line of legal reasoning, and that it would upset the established line of authorities, and generally create a chaotic condition effecting the system now being practiced in the administration of bankruptcy estates.

At the time of adopting the Federal Constitution the several states surrendered the right to Congress to establish a uniform

system of bankruptcys, and should it be contended that the state law is not being now recognized, so as to uphold the right to attorney's fees, the answer is that such state law must give way to the bankruptcy law.

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